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October Term, 1978

No. 79-261

LEROY BARNES, STEVEN BAKER, JOSEPH HAYDEN, JOHN HATCHER, WAYMIN HINES, JAMES MCCOY, WALLACE FISHER, WALTER CENTENO, LEON JOHNSON, STEVEN MONSANTO and LEONARD ROLLOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO
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Petitioners Leroy Barnes, Steven Baker, Joseph Hayden, John Hatcher, Waymin Hines, James McCoy, Wallace Fisher, Walter Centeno, Leon Johnson, Steven Monsanto and Leonard Rollock respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (Moore and Van Graafeiland, JJ.) (Meskill, J., dissenting) (App. A, *infra*, pp. 1a-100a) is not yet reported. The decision of the Court of Appeals denying rehearing or rehearing *en banc* (Oakes, Timbers and Meskill, JJ., dissenting from the denial of rehearing *en banc*) (App. B, *infra*, pp. 101a-105a) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 23, 1979. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied on June 18, 1979. On July 3, 1979, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 17, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether a criminal defendant may be tried before an "anonymous" petit jury and whether a defendant may be compelled to empanel a jury whose veniremen's names, identities, residence locales or ethnic and religious backgrounds are withheld during the trial court's *voir dire*.
2. Whether a defendant's right to trial by an impartial jury is violated by a trial court's refusal to make inquiry into a documented incident of juror misconduct whereby a trial juror exhibits blatant prejudice against the defense outside the court's presence.

3. Whether a hearing lies to determine if the Government's acquisition of a defendant's income tax returns for use in a nontax criminal prosecution violates the provisions of Title VII of the Tax Reform Act of 1976.

Constitutional Provisions, Statutes and Rules Involved

The Fourth Amendment to the United States Constitution

The Sixth Amendment to the United States Constitution

Title 26 United States Code §6103

Title 28 United States Code §§1862, 1863 and 1866

Rule 24 of the Federal Rules of Criminal Procedure

The pertinent text of the foregoing provisions is set forth in Appendix C, *infra*, pp. 106a-111a.

Statement of the Case

1. On March 14, 1977, a grand jury in the Southern District of New York returned an indictment charging seventeen individuals, among them petitioners herein, with conspiracy to violate the federal narcotics laws, in violation of 21 U.S.C. §846, and with various individual substantive violations thereof (21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A)). In addition, petitioner Barnes was charged separately with managing the alleged conspiracy as a continuing criminal enterprise, in violation of 21 U.S.C. §848.

Given the vast scope of the prosecution and the newsworthiness of petitioner Barnes, the case, not surprisingly, engendered massive pretrial publicity in the metropolitan

New York area, most notably a cover story appearing in a May 1977 issue of the New York Times Sunday Magazine. Pretrial motions by the defense for a change of venue or, in the alternative, restrictions upon pretrial publicity and the information disseminated to the press all were denied. However, in response at least in part to the pervasive publicity surrounding the case, the district court consented to adjourn the trial's scheduled commencement from June 1977 to September 1977.*

When the court reconvened in September 1977, however, just prior to the commencement of trial itself, the trial judge announced, *sua sponte*, the procedures he had decided to follow in connection with the empaneling and *voir dire* examination of prospective jurors. Without assigning any reasons for his unprecedented action, other than an expressed solicitude for the jurors' "privacy"—jurors he had already decided to sequester, in any event—the judge announced that he had decided to withhold from counsel the names, identities or residence locales of the veniremen during the actual *voir dire* and that he would refuse to make any alternative inquiry, in light of their anonymity, into the individual jurors' ethnic or religious backgrounds as part of the *voir dire*, claiming the latter to be "irrelevant" to the intelligent exercise of defendants' peremptory challenges.**

* During the jury *voir dire* itself, in September 1977, the judge was again to express his grave concern with the "irresponsibility" of the press in this case (17a).

** When counsel suggested that, based on the sequestration order and the restrictions regarding names and addresses, jurors would infer the "real" reason for the judge's actions, namely, that the court believed that the jurors and their families might somehow be in danger, the judge disavowed the suggestion, responding: "It has nothing to do with any real reason. I just do not want them interfered with,

(footnote continued on next page)

The trial judge's actions, occurring *sua sponte* on the eve of trial—without any advance notice or request for such relief from the Government—caught defense counsel, who already had routinely submitted the customary *voir dire* requests, completely by surprise. Despite defense requests that, in order to preserve juror privacy—the court's ostensible motive—the names be revealed to counsel *in camera* or that spectators be excluded during the *voir dire*—suggestions supported by ample authority—both alternatives were rejected by the trial court. Moreover, the court refused to permit the defendants to supplement their earlier submitted *voir dire* requests, despite these latterly-imposed—and unexpected—restrictions.*

their privacy interfered with." (87a). Upon informing the prospective jurors that they were not to disclose their names and addresses and that they would be sequestered, the judge informed them that his decision was based on the likelihood of extensive trial publicity and the possibility that the media would attempt to interview jurors' families.

That no actual threats were, in fact, received in this case was noted explicitly by Judges Meskill and Oakes, in dissent (87a, 104a), and conceded by the Majority (18a, 27a).

* A sample of the colloquy that transpired at the judge's announcement gives a rough idea of counsel's surprise and the court's disinclination to engage in extensive dialogue on the subject:

[COUNSEL]: Their names will not be revealed?

THE COURT: That is right.

[COUNSEL]: I object.

THE COURT: You can object as much as you like; that is my ruling;

[COUNSEL]: Your honor . . .

THE COURT: Sit down. I have made my ruling. I don't want to listen any more.

(HTr. 7-8)

Moreover, the record reveals that the trial judge exercised very little discretion on the subject, simply announcing his decisions, without entertaining oral argument, and immediately silencing all attempts at colloquy (87a). As noted by Judge Meskill, in dissent, citing Judge Magruder's "abuse of discretion" standard in *In Re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954), under the circumstances, "[i]t can hardly be said that he 'weigh[ed] the relevant factors'." (92a).

The trial judge's extraordinary cluster of restrictions regarding his conduct of the *voir dire* in this case thus made the actual *voir dire* the only possible source of information available about the prospective jurors. The identities of the prospective jurors were kept secret. All independent investigation was expressly prohibited. The jury that was ultimately selected was immediately sequestered. And any inquiry regarding prospective jurors' ethnic backgrounds—information traditionally relied upon as a basis for the exercise of peremptory challenges—was explicitly precluded by the trial court, despite the fact that such information routinely is imparted to litigants in fundamentally neutral fashion merely through the disclosure of veniremen's names and residence locales.

Jury *voir dire*, whose ultimate purpose is to elicit broad information regarding potential veniremen's backgrounds and attitudes, thus was restricted by the trial judge in this case virtually to matters upon which challenges for cause were to be exercised, totally frustrating defense attempts to gain insight into jurors' habits, lifestyles, philosophies, biases or prejudices.

The trial court's restrictions evinced not only a fundamental misconception of the scope of jury *voir dire*, but manifested, as well, a total evisceration of the role of peremptory challenges in the jury selection process. If the right to peremptory challenges is to exist at all, its exercise must be conditioned upon the elicitation of sufficient background information to render its exercise meaningful. *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972). The unprecedeted actions of the trial judge in refusing to elicit such information in this case, however, rendered the exercise of defendants' peremptories an empty ritual.

2. A sharply divided United States Court of Appeals for the Second Circuit (Moore and Van Graafeiland, JJ.) (Meskill, J., dissenting) affirmed the convictions. Noting that “[i]t is not, after all, the prospective jurors who are on trial . . .” (25a), and that if extensive questioning of prospective jurors were allowed, “any semblance of juror privacy would have to be sacrificed” (31a), the Majority held that, as long as there is some *voir dire* questioning as to identifiable issues connected with the persons or events likely to be involved at trial, “an appellate court faced with a cold record should be satisfied that justice has been done” (23a). Conceding that, in point of fact, no untoward incidents had occurred prior to trial which might have warranted the drastic—and unprecedeted—restrictions actually imposed (18a, 27a), the Majority held, nevertheless, that it would not interfere with the trial court's discretion, despite the court's failure to explore less drastic alternatives, because, given the “all too sordid” history of suspected jury tampering in other unrelated narcotics trials, “precaution was best taken so that fears would not become realities” (27a).

Judge Meskill dissented (85a-100a). Noting that the peremptory challenge is one of the most essential safeguards by which defendants may secure a fair and impartial jury (90a), he found the cumulative effect of the trial court's cluster of decisions restricting *voir dire* in this case, in the absence of persuasive countervailing considerations, to have been so significant as to have deprived defendants of a fair trial. Observing that the trial judge had taken this unprecedeted action *sua sponte*—without any request by the Government—and that all defense requests for colloquy on the subject were sharply denied (87a),

Judge Meskill determined that, under the circumstances, where defendants were not provided jurors' names or addresses, failure to make alternative inquiry into their ethnic backgrounds constituted fundamental error warranting reversal.

3. The Court of Appeals denied rehearing or rehearing *en banc* with three judges dissenting (Oakes, Timbers and Meskill, JJ., dissenting from the denial of rehearing *en banc*) (103a-105a). Observing that the Majority had ratified an entirely new rule of law standing without precedent in the history of Anglo-American jurisprudence, Judge Oakes, reiterating that no threats had occurred prior to trial, noted that sequestration obviously would have been an ample remedy if anyone had been threatened (104a) and that, in any event, there existed other less drastic alternatives—including revelation of jurors' identities *in camera* to counsel—that went unexplored by the trial judge (105a). Recounting an extensive litany of sensational trials involving notorious defendants over the past forty years in which jury anonymity had never before even been contemplated, much less implemented *sua sponte*, Judge Oakes concluded, presciently, that the precedent established by this case was as sure to be followed by other judges as "a flock of sea gulls follows a lobster boat" (105a).*

* Indeed, any suggestion that the case at bar is strictly *sui generis* and unlikely to recur was quickly put to rest by the Second Circuit itself, which subsequently affirmed a similar case involving analogous restrictions on disclosure of jurors' residence locales and communities. *United States v. Gibbons*, — F.2d —, No. 78-1189 (2d Cir. June 25, 1979). Moreover, the legal controversy engendered has spilled over into the public sector, leading even the New York Times to comment editorially on "tr[ial] by people, not by numbers." The New York Times (May 10, 1979) p. 22. See also, Nat'l. L.J. (June 18, 1979) p.3; N.Y.L.J. (July 16, 1979) p. 1; N.Y.L.J. (August 10, 1979) p. 1.

Reasons for Granting the Writ

I

The District Court's unprecedented empaneling of an "anonymous" petit jury, its refusal to disclose jurors' ethnic backgrounds and its failure to explore less drastic alternatives denied petitioners' Sixth Amendment rights.

A sharply divided panel of the United States Court of Appeals for the Second Circuit, in the context of affirming petitioners' convictions, has ratified a novel rule of law, totally unsupported by authority from any other circuit or this Court, which is unique and without precedent in the entire history of Anglo-American criminal jurisprudence.

It has sanctioned—for the first time in American legal history—the trial of a defendant in a criminal prosecution before an "anonymous" petit jury; *viz.*, a jury that was empaneled without the veniremen's names, identities or residence locales being revealed to counsel during the course of the trial court's *voir dire* and one that was empaneled without permitting any inquiry whatsoever, in light of their anonymity, into the individual jurors' ethnic or religious backgrounds.

Never before has there been a criminal trial conducted in this Nation—under federal or state jurisdiction—in which a defendant was not provided with the identities of his prospective jurors as a customary—and undeviating—part of the trial court's *voir dire* process.

Yet in this criminal case, with absolutely no basis in prior law, the Second Circuit has effectively emasculated a fundamental part of the Sixth Amendment's jury trial guarantee. It has granted a trial judge the untrammeled discretion to withhold from litigants the identities of petit jurors in any case in which he unilaterally perceives a danger to the jurors' "privacy"—the express reason given by the trial judge herein—without even imposing a correlative obligation on the trial judge to (a) articulate reasons as to the particularity of the danger inherent in disclosure and (b) make a finding that no less drastic remedies—including sequestration and *in camera* proceedings—will afford satisfactory protection before resort to the severe—and unprecedented—sanctions meted out in the instant case.

A. Failure to Disclose Jurors' Identities or Ethnic Backgrounds

The Court of Appeals plainly mischaracterized petitioners' argument by implying that they sought a generalized fishing expedition into jurors' backgrounds wholly unrelated to any conceivably relevant line of inquiry.*

* In the interests of clarity, it should be emphasized what petitioners do *not* contend. First, it is not asserted that defendants are entitled, as a matter of right in every case, to jury lists and prospective jurors' names and addresses in advance of trial. Cf., *United States v. Clarke*, 468 F.2d 890 (5th Cir. 1972); *United States v. Mills*, 440 F.2d 647 (6th Cir. 1971); *Stone v. United States*, 324 F.2d 804 (5th Cir. 1963) (failure to provide jury lists *prior* to trial in non-capital case not error) *with* 18 U.S.C. §3432; *United States v. Crowell*, 442 F.2d 346 (5th Cir. 1971); *United States v. Hoyt*, 451 F.2d 570 (5th Cir. 1971); *Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967) (pre-trial disclosure of jury lists in capital case compelled). Despite the obvious utility of such pre-trial disclosure to counsel, all that is asserted here is that, at a minimum, litigants are entitled, as they always have been, to such disclosure at the time of actual *voir dire*

(footnote continued on next page)

The critical relevance that sufficiently expansive jury *voir dire* plays in exploring grounds upon which peremptory challenges may intelligently be exercised springs from judicial recognition of the fact that, even where jurors' responses fall short of an admission of bias, such responses may nevertheless aid counsel in deciding to exercise peremptory challenges. *United States v. Harris*, 542 F.2d 1283 (7th Cir. 1976); *United States v. Dellinger*, *supra*, 472 F.2d at 367-370.

Experience has shown that one of the most effective means to free the jury-box from [jurors] unfit to be there is the exercise of the peremptory challenge. The public prosecutor [and, presumably, the defendant] may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted.

Hayes v. Missouri, 120 U.S. 68, 70 (1887).

In evaluating the importance of peremptory challenges to a defendant's right to fairly empanel "his" jury, this Court has observed that, whatever its constitutional underpinnings, the peremptory is still "one of the most important of the rights secured to the accused," and that "[t]he

itself. See, *ABA Standards Relating to Trial By Jury*, §2.2 (Approved Draft, 1968).

Second, it is not asserted that defendants ordinarily are entitled, in each and every case, to *voir dire* prospective jurors on their ethnic or religious backgrounds. Cf., *Ristaino v. Ross*, 424 U.S. 589 (1976); *Ham v. South Carolina*, 409 U.S. 524 (1973); *United States v. Tramunti*, 513 F.2d 1087, 1114 (2d Cir. 1975). Rather, in light of the trial court's *sua sponte* ruling in this case denying access to jurors' identities, inquiry into prospective jurors' ethnic backgrounds, in lieu of their identities, was mandated, under the circumstances, in the interests of fundamental fairness.

denial or impairment of the right is reversible error without a showing of prejudice." *Swain v. Alabama*, 380 U.S. 212, 219 (1965).

Critical in the context of exploring jurors' backgrounds—especially where their identities are not revealed—is the ethnic or religious backgrounds of prospective jurors in order for counsel to properly weigh and evaluate those factors which make up the whole person. Indeed, as several commentators have noted, this Court has implicitly approved peremptory challenges based on group affiliations of prospective jurors. Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stanford L.Rev. 1493 (1975).

In *Swain v. Alabama, supra*, this Court rejected attempts to place restrictions upon prosecutors' exercise of peremptory challenges for suspected racial or ethnic motives, stating that litigants' untrammeled discretion in the exercise of these challenges was sacrosanct, even when based upon ethnic considerations:

[The peremptory challenge] is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation, or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the voir dire, by both prosecu-

tor and accused. . . . This Court has held that the fairness of trial by jury requires no less. Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliation, in the context of the case to be tried.

Id., 380 U.S. at 220-221 (emphasis added).

See also, *United States v. Newman*, 549 F.2d 240, 249 (2d Cir. 1977).

In analyzing the necessity for this kind of background evaluation and its relevance in exercising challenges, Professor (now Assistant Attorney General) Babcock has articulated what is probably the underlying motive behind the relevance of such an inquiry:

The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . Common human experience, common sense, psychosociological studies, and public opinion polls tell us that it is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable and open to compromise. . . . Instead we have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.

Challenges for cause, moreover, could not effectively screen those who share biases and prejudices common to a social or ethnic group, or an economic or social class. . . . This phenomenon is especially likely

to occur in cases of group bias where the individual juror may have no inkling that his views are not shared by others outside his own group or that his attitudes so profoundly color his perceptions that he may be incapable of accepting testimony with an open mind.

Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stanford L. Rev. 545, 553-554 (1975).*

Ordinarily, this information is imparted to litigants in fundamentally neutral fashion—disclosure of jurors' names and addresses as a normal part of the *voir dire*. Had that ordinary practice been followed here, in point of fact, there would be no need to consider special inquiry into an area of such great sensitivity.

However, in the case at bar, it was this very failure of the trial court to permit inquiry either into jurors' names and addresses *or* their ethnic backgrounds that effectively emasculated defendants' ability to intelligently exercise their peremptory challenges. In an analogous context, this Court repeatedly has struck down similar restrictions placed upon defense inquiry into witnesses' names and addresses for the selfsame reasons asserted here for inquiry into jurors' backgrounds.

In *Smith v. Illinois*, 390 U.S. 129 (1968), this Court held it constitutional error to sustain objections to defense

* Indeed, the experience of recent celebrated trials, and the jury selection techniques that were employed, demonstrate beyond peradventure that ethnic backgrounds and group affiliations of jurors may well be the single most critical piece of information to be elicited upon *voir dire*. See, e.g., Zeisel & Diamond, *The Jury Selection in the Mitchell-Stans Conspiracy Trial*, 1976 Amer. Bar F. Res. J. 151; Babcock, *Voir Dire*, *supra*, 27 Stanford L. Rev. at 560 n.54 (and authorities cited therein).

questions asking a witness for his name and address, stating:

The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

Id., 390 U.S. at 131.

The analysis offered by Mr. Justice Stone in *Alford v. United States*, 282 U.S. 687 (1931) elucidates the purpose for this strict rule:

Counsel often cannot know in advance what pertinent fact may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. (citations omitted).

* * *

The question "Where do you live?" was not only an appropriate preliminary to the cross-examination of the witness, but on its face . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

Id., 282 U.S. at 692-693.

See also, *United States v. Harris*, 501 F.2d 1, 7-9 (9th Cir. 1974); *United States v. Ott*, 489 F.2d 872, 875-877 (7th Cir. 1973) (Stevens, J.).

The critical importance of such probing inquiry is patent. *Voir dire* represents the only opportunity for litigants to examine and screen jurors, who are to have the most crucial role in the trial process as the ultimate triers

of fact.* Since appellate courts exhibit great reluctance to disturb *voir dire* decisions unless prejudice is strongly suggested, jury bias goes effectively unchallenged once the opportunity to screen it out on *voir dire* has passed. See, *United States v. Dioguardi*, 492 F.2d 70 (2d Cir. 1974).**

If the right to trial by an impartial jury and the right of confrontation are, after all, correlative Sixth Amendment rights, one fundamental corollary is that defendants, at the very least, are entitled to be confronted not merely by their accusers, but also by the triers of their fates as well.+ For the *voir dire* to be more than an empty formal-

* Indeed, Professor Babcock has specifically analogized jury *voir dire* to cross-examination, quoting 5 J. Wigmore, *Evidence* §1367 (3d ed. 1940) (27 Stanford L. Rev. at 565).

** In the instant case, moreover, juror bias and actual misconduct was not merely speculative, but, in fact, actually surfaced midtrial. See Point II, *infra*.

+ Moreover, jury anonymity—and its relationship to trial secrecy—obviously implicates subsidiary Sixth Amendment issues transcending the simple impairment of defendants' right to properly exercise peremptory challenges. The central purpose of trial by jury "is to prevent oppression by the Government by providing a 'safeguard against the compliant, biased, or eccentric judge.' . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . ." *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Zicarelli v. Gray*, 543 F.2d 466, 479 (3d Cir. 1976) (en banc).

Yet, the obvious implications of the empaneling of an anonymous jury—though the trial itself be held in open court—is to remove from the defendant, and the public, the confidence in the jury system as an independent safeguard of a democratic society. This Court, indeed, only recently has recognized that the public trial right guaranteed by the Sixth Amendment is a right created primarily for the benefit of the defendant. *Gannett Co., Inc. v. DePasquale*, 99 S.Ct. 2898 (1979). This inherent distrust of secret proceedings is deeply rooted

(footnote continued on next page)

ity, it is fundamental that defendants must be permitted to inquire into the identities of the jurors who are to sit in judgment of them:

[The accused] cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

Pointer v. United States, 151 U.S. 396, 408-09 (1894)

B. Failure to Explore Less Drastic Alternatives

As noted by Judge Oakes, the City of New York certainly is no stranger to the sensational trial nor to the notorious (or newsworthy) defendant (104a-105a). Yet in no trial in history has a court ever before intimated—much less ruled *sua sponte* on the eve of trial—that a criminal defendant is not entitled to be apprised of the identities of his jurors, particularly in the case at bar, where it is undisputed that (a) there had been no suggestion of threats, (b) the added prophylactic precaution of sequestration already had been decided upon and (c) there was no suggestion that sequestration was an insufficient remedy.

In the face of so formidable an array of uniform prior practice—and the unprecedented action he was about to

in Anglo-American jurisprudence, harkening back to the excesses historically attributed to the Spanish Inquisition and the English Court of Star Chamber. *In re Oliver*, 333 U.S. 257, 268 (1948). It can thus be no answer to say that, despite the jurors' anonymity, the trial itself was open to the public. As historians have noted, despite its privately-practiced excesses, the Court of Star Chamber still held its actual trials in public. *Gannett*, 99 S.Ct. at 2926-27.

take—the trial judge had, at the very least, some minimal obligation to place on the record his reasons for taking such drastic action and for finding that no less drastic alternatives existed in this case. No such findings, of course, were made; the trial judge refusing even to entertain colloquy from counsel on the subject.

In ratifying the trial judge's conduct in empaneling an "anonymous" jury—waiting virtually until the eve of the trial to announce his decision (and catching all parties completely by surprise)—the Court of Appeals operated on two clearly erroneous assumptions. First, it assumed the district judge's actions were "manifestly necessary" in light of the "all too sordid" history of jury tampering in other wholly unrelated Southern District narcotics trials. Second, it assumed that, before having taken such drastic action, the trial court painstakingly considered all less drastic alternatives, and after careful consideration (and consultation with counsel), it prudently exercised its discretion by taking the actions complained of herein. Neither assumption is borne out by record fact.

In the first place, despite the Majority's transparent attempts to portray the purported "dangerousness" of these defendants—based entirely upon wholly speculative analogy to other unrelated multidefendant narcotics conspiracy trials—in point of fact, as noted by the dissent, *no* incidents occurred either before or during the trial of this case to justify any inference of dangerousness (104a). The Majority implicitly conceded as much when it stated that, while no actual threats were received in this

case, "the suggestion of disruption was manifest" (18a, 27a).*

Second, the trial judge refused to entertain argument on the subject—simply announcing his decision *sua sponte* on the eve of trial and immediately silencing all attempts at colloquy (HTr. 7-22).** As noted by Judge Meskill, in dissent, under the circumstances, "[i]t can hardly be said that he 'weigh[ed] the relevant factors'" (92a).†

Third, and most importantly, not only was this wholly unprecedeted action taken without the input of counsel, but the trial judge made no attempt to preserve juror privacy from media inquiry by means less drastic than total anonymity, despite the existence of substantial au-

* One notes, rhetorically, that if "the suggestion of disruption was manifest," the District Court could have remanded the defendants with "high risk" designations were they to pose such a clear and present danger to the court or the community. See, Rule 6(b) of the Southern District Speedy Trial Plan. Yet the District Court explicitly refused to do so.

** Significantly, the trial judge adhered to his decision in the face of subsequent defense requests that, in order to preserve juror privacy—the court's ostensible motive—the names be revealed to counsel *in camera* or that spectators be excluded during the *voir dire*. Both suggestions were rejected by the trial court. Moreover, the court refused to allow the defense to supplement its earlier submitted *voir dire* requests, despite these latterly-imposed—and unexpected—restrictions.

† In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court upheld the trial court's declaration of a mistrial although ultimately deeming it not to be manifestly necessary. The Court predicated its affirmance, however, on the fact that, in making its ruling, the trial court evinced concern on the record for the double jeopardy consequences of its action and had given both sides opportunity to present argument on the point. Thus, the trial court had at least exercised its sound discretion in declaring a mistrial even though it proved to be not strictly necessary (*Id.*, 434 U.S. at 511-17). See also, *United States v. Starling*, 571 F.2d 934, 940-41 (5th Cir. 1978); *United States v. Grasso*, — F.2d —, No. 78-1284 (2d Cir. April 23, 1979) slip op. 5685, 5694 n.12.

thority for reaching that very result by means less restrictive of defendants' right to a full and fair *voir dire* of the potential trial jurors.

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1977), this Court held that where pretrial disclosure of information prejudicial to the accused was being disseminated by the media, and where such events presented an imminent threat to the empaneling of a constitutionally impartial jury, the trial court had numerous options at its disposal, short of issuance of a constitutionally invidious "gag order" on the press, by which to preserve the impartiality and integrity of the trial process. Among the prophylactic alternatives left open by this Court was that of "[c]losing of pretrial proceedings with the consent of the defendant." *Id.*, 427 U.S. at 564, 576 n.3, 584 n.11 (Brennan, J., concurring). See also, *Gannett Co., Inc. v. DePasquale*, 99 S.Ct. 2898 (1979).

Moreover, there is virtually limitless authority for the trial court to have adopted counsel's suggestion that the jurors' identities be revealed *in camera* or that the general public be foreclosed from the jury selection process. See, e.g., *In re United States (Socialist Workers Party)*, 565 F.2d 19, 23 (2d Cir. 1977) ("[I]t is by now well-established that a district judge, in the exercise of his discretion, may permit opposing counsel to participate in and assist him in the conduct of *in camera* proceedings under a pledge of secrecy"); *United States v. Gurney*, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977) (jury lists kept sealed from public though veniremen's names read aloud in open court); *United States v. Hoffa*, 367 F.2d 698, 710 (7th Cir. 1966), vacated on other grounds, 387 U.S. 231 (1967) (jurors'

names need not be read aloud in open court); *Gannett Co., Inc. v. DePasquale, supra*.

Fourth, it is highly significant that the Government never requested the jury anonymity granted here, fully content that simple sequestration, without more, would completely serve the purpose of protecting jurors from extraneous influences.* Certainly, at the time of trial, it felt its interests more than adequately protected by that limited remedy.**

The requirement that the court explore the availability of less drastic alternatives where a possible curtailment of constitutional rights is threatened is inherent in the very nature of due process. See, e.g., *Covington v. Harris*, 419 F.2d 617, 623 n.17 (D.C. Cir. 1969). It is, after all, an axiom of due process that:

* Indeed, it may be noted parenthetically that, had the jury been sequestered in *United States v. Borelli*, 336 F.2d 376, 392 (2d Cir. 1964) or the other cases relied upon by the Majority (12a), the problems there encountered quite conceivably might never have arisen.

** ABA Guidelines dealing with news coverage of court matters recommend that sequestration be permitted in highly publicized trials upon motion of either party, or upon the court's own motion, when appropriate. ABA STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS §3.5(b) (Approved Draft 1968). A study undertaken by the Association of the Bar of the City of New York concerning fair trial-free press conflicts suggested that sequestration be utilized more frequently than it has been in the past, finding it "in theory, [to be] an ideal remedy for publicity appearing during the trial." Special Committee On Radio, Television, And the Administration Of Justice Of The Association Of The Bar Of The City Of New York, FREEDOM OF THE PRESS AND FAIR TRIAL 58 (1967). See also, Note, *Sequestration: A Possible Solution to the Free Press-Fair Trial Dilemma*, 23 Am. U. L. Rev. 923, 933-34 (1974) (sequestration effectively insulates jurors from prejudicial publicity without imposing restrictions upon press); Note, *Alternatives Available to Trial Courts to Protect Jurors from Prejudicial Publicity*, 9 Seton Hall L. Rev. 73, 92 (1978).

"... even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of... abridgment must be viewed in light of less drastic means for achieving the same purpose."

Shelton v. Tucker, 364 U.S. 479, 488 (1960).

This principle is entirely as applicable in the context of a criminal proceeding as in the case of overbroad legislation.

Manifestly, in light of the altogether extraordinary action taken by the trial judge—far in excess of any relief requested by the Government—it was incumbent that before taking such unprecedented steps, it be required to explore all possible alternative courses—including sequestration and *in camera* proceedings—and make explicit findings, preferably after a hearing, that there existed no reasonable alternative to jury anonymity. See, e.g., *Gannett Co., Inc. v. DePasquale*, *supra*, 99 S.Ct. at 2937 (Blackmun, J., dissenting); *United States v. Spinella*, 506 F.2d 426, 432 (5th Cir.) (Wisdom, J.), cert. denied, 423 U.S. 917 (1975).

In the instant case, however, no such exploration of alternatives, or articulation of reasons behind the court's unprecedented actions, was forthcoming. In the interests of preserving jurors' privacy—jurors who were being sequestered, in any event—the trial court took actions wholly out of proportion to the narrow purpose sought to be achieved and in so doing, deprived defendants of their fundamental right to properly empanel a jury of their peers.

What the Court of Appeals has ratified, then, is nothing less than unprecedented blanket authorization to keep ju-

rors' identities secret any time the trial court unilaterally perceives a danger of "undue influence"—no matter how remote or unparticularized—without first imposing a correlative duty on the trial court to make findings of fact (a) as to the particularity of the danger and (b) that no less drastic remedies—including sequestration and *in camera* proceedings—will afford satisfactory protection before resorting to the severe sanctions meted out in this case.

Under the unique facts of this case, where the trial court's sole expressed rationale was to preserve juror privacy from the media, where the Government itself though sequestration sufficient, where counsel was never consulted or permitted to be heard on the matter and, most importantly, where the trial court itself had made implicit factual findings of non-dangerousness on the part of defendants, the trial court's *sua sponte* conduct was clear error.

II

Petitioners' right to trial by an impartial jury was violated by the trial court's refusal to inquire into a documented incident of juror misconduct against the defense outside the Court's presence.

The presence of even one prejudiced juror violates a defendant's fundamental right to trial by an impartial jury. *Turner v. Louisiana*, 379 U.S. 466, 471 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722, 727 (1961). Consequently, the unvarying rule in every circuit, and this Court, always has been that allegations of juror misconduct or bias manifest-

ing itself outside the Court's presence require the trial judge at a minimum to make some form of inquiry.

In this case, however, the Court of Appeals failed to follow this established rule. Rather, it sustained the district court's decision to ignore a juror's outrageous exhibition of bias against the defense, without so much as an inquiry into the incident. Because this ruling is in direct conflict with the established practice in every other circuit—as well as decisions of this Court interpreting the Sixth Amendment's guarantee of an impartial jury—and because of its fundamental importance to the conduct of criminal trials, the Court should grant certiorari to review this holding.

A. The Incident on the Jury Bus

The danger that prejudice and pre-judgment might infect the jury in this trial was particularly acute. The anonymity of the jury and the undue limitations placed on *voir dire* created a substantial risk that persons harboring prejudices created by pre-trial publicity might well be admitted to the jury. Moreover, the anonymity of the jury, sequestration, and the other special features of this trial in and of themselves were certain to engender speculation among the jurors that such procedures were made necessary by some particular infamy attributable to the defendants. In light of these highly unusual circumstances, then, it was imperative that the credibility of the trial evidence—and defendants' consequent innocence or guilt—be determined by an objective and dispassionate jury.

Shortly after the commencement of trial, Juror No. 7* began acting in a suspicious fashion. On various occasions, he was observed either turning his back on the defendants and their counsel or giving them "scary" looks (Tr. 5899). Even the trial judge's attention was drawn to this juror "in particular", the court noting that he seemed to be "the sleepy one on the jury." (Tr. 5899).

Then, on November 1, 1977, after one month of trial, four defense attorneys happened upon the juror bus as they were leaving the courthouse at the end of the day. What transpired was subsequently described on the record:

(COUNSEL): The bus was completely well lit. As we were walking by the bus I looked up into the bus. Seated in the back of the bus, I think in the last seat, was Juror No. 7. Seated to his left and maybe slightly in front of him was I believe the second alternate juror in the case. There was another juror back there in that area. I don't remember who it was, though.

As I looked at the juror, Juror No. 7's eyes met mine and the man gave me a—I don't know how to describe it except the f--- you sign.

THE COURT: The international signal.

(COUNSEL): With his finger . . . I clearly saw it. There was also an expression on his face of, to say the least, distaste for me.

* * *

This man gave me the finger, Judge. It's as if he yelled out to me, "F--- you, Mr. Goldberger." That's exactly what he did.

(Tr. 5888-5895)

* This juror can be identified only by his position in the jury box, since the trial court refused to disclose any juror's name. (See Point I, *supra*.)

Confronted with this overt demonstration of animus and hostility, counsel immediately returned to the courthouse to advise the court of what had just transpired. The following morning, they repeated that description on the record. The fear that this juror was prejudiced, had prejudged the case, or had communicated such views to other jurors with whom he was sequestered, understandably was paramount in the attorneys' minds:

(COUNSEL): To say it's an ordinary circumstance for a juror to turn around and give the international sign, the finger, the f--- you sign, as it is to a lawyer in a case in the middle of the trial when you are a juror, I think is ridiculous. I think it indicates and manifests the state of mind of a person that is not in a frame of mind to be a juror. He's obviously made up his mind in this case already, Judge.

I don't know about the other people who were sitting in the back of the bus with him. I can't say they did anything except the No. 2 alternate juror was smiling at the time.

(Tr. 5891)

A hearing was necessary to determine the extent to which the defense was victim to this juror's obvious hostility:

(COUNSEL): . . . whether it's just me or my client and me or it manifests the feeling he has for the entire defense—that I don't know for sure.

(Tr. 5891)

However, even without a hearing, one fact seemed clear:

(COUNSEL): This man is certainly not going to vote not guilty in this case.

(Tr. 5892)

Despite Juror No. 7's misconduct, the Government opposed, and the trial court denied, defense applications to *voir dire* this juror or to replace him with one of the five remaining alternates.* Moreover, the Government opposed, and the trial court refused, any inquiry whatsoever to determine whether this juror was qualified to continue on the jury or whether any other jurors were privy to the taint. Rather, at the Government's request, the trial court contented itself with instructing the jury in a neutral fashion, without reference to the incident at bar, that they should "keep an open mind" (Tr. 5902).

Consequently, this individual remained on the jury, interacting and conversing with the other jurors for the final four weeks of trial, and ultimately participating in the deliberations which resulted in the convictions now on appeal. Given the trial court's refusal to remove—or even to question—this juror, the convictions are constitutionally infirm and must be set aside.

Juror No. 7's obscene gesture and other misconduct were, in and of themselves, such compelling evidence of a debilitating bias that the trial court erred in failing summarily to replace him. This Court need not resolve that issue, however; at the very least, the trial court had an affirmative "duty to inquire" once the question of bias was raised. See, e.g., *United States v. Spinella*, 506 F.2d 426 (5th Cir. 1975). Its refusal to make such inquiry requires that petitioners be afforded a new trial.

* This application was renewed, and again denied, immediately before the jury began its deliberations.

B. Failure to Conduct an Inquiry

Confronted with allegations of Juror No. 7's misconduct, the trial court was constitutionally obliged to grant defense counsel's motion that the juror be questioned:

Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.

Dennis v. United States, 339 U.S. 162, 171-72 (1950)

Although the trial court had discretion in determining the precise scope of the inquiry to be made—and the nature of appropriate relief if prejudice was confirmed—it abused its discretion by refusing to conduct *any* inquiry whatsoever. Cf., *Mattox v. United States*, 146 U.S. 140, 147 (1892) (trial court's failure to consider evidence of prejudice constitutes a failure to exercise its discretion).

Rather, in giving practical effect to the Sixth Amendment, all circuits have held that inquiry is mandated where facts suggesting even the possibility of juror prejudice or misconduct are alleged:

Implicit in these cases is the assumption that when jury misconduct is alleged, the trial judge has a duty to . . . conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; . . . if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review.

United States v. McKinney, 429 F.2d 1019, 1026 (5th Cir. 1970)

See also, United States v. Rhodes, 556 F.2d 599 (1st Cir. 1977); *United States ex rel. Greene v. State of New Jersey*, 519 F.2d 1356 (3d Cir. 1975); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *appeal after remand*, 430 F.2d 675 (9th Cir. 1970).

Since the trial court refused inquiry, the Court of Appeals had no valid basis for speculating that the hostility which Juror No. 7 so blatantly expressed might have been reserved solely for defendant Guy Fisher's attorney (34a). In describing Juror No. 7's actions to the court, counsel stressed that although he was the only attorney who clearly observed the gesture, he had no way of knowing whether it was directed only at himself, at all four of the attorneys who were then walking past the bus, or by implication, at the entire defense (Tr. 5891). Indeed, as lead counsel, Fisher's attorney was the most visible embodiment of the defense and as such, the most likely target of any enmity toward the defense in general. The difficulty of fathoming, from the mere description of such misconduct, whether it was directed toward only one attorney or whether it constituted a disparagement of the defendants, is one of the principal reasons why the court is obliged to conduct an inquiry.

The Court of Appeals also misconceived the jury's mixed verdict as proof that Juror No. 7's prejudice did not infect the jury deliberations (34a-35a). Quite the contrary, in many of the cases in which failure to inquire into possible juror bias was held to require a new trial, the

jury was equally "discriminating."** Despite its surmise that the mixed nature of the verdict evidenced impartiality, it is just as possible that such a verdict evidenced the success of one or more jurors in inducing their trial-weary associates to compromise rather than deadlock. Although a compromise verdict by an impartial jury would not be grounds for reversal, any verdict rendered by a jury containing even one biased juror must be set aside. *United States v. Rattenni*, *supra*, 480 F.2d at 198.

Unfortunately, the court's cautionary instruction was a patently inadequate substitute for the mandated inquiry. In all likelihood, it merely alerted this juror to the fact that he would have to disguise his prejudices more carefully, or else face judicial censure or removal from the jury. Given Juror No. 7's graphic expression of prejudice, only judicial inquiry and possible expulsion of this juror could effectively insure that petitioners' Sixth Amendment rights were being protected. *See, e.g., United States v. Pomponio*, 517 F.2d 460, 463 (4th Cir. 1975).

The Court of Appeals' opinion notwithstanding, the gesture which Juror No. 7 made on the evening of Novem-

* *United States v. Pomponio*, 517 F.2d 460 (4th Cir. 1975) (two defendants convicted of all charges, two other defendants convicted of two counts, acquitted of two counts, and hung jury as to one count); *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968) (both defendants acquitted as to conspiracy charge, both convicted as to approximately half of the other charges); *Coppedge v. United States*, 272 F.2d 504 (1st Cir. 1959) (one defendant acquitted, one defendant convicted); cf., *United States v. Rattenni*, 480 F.2d 195 (2d Cir. 1973) (jury reported deadlocked as to three of four defendants and as to all but one count for fourth defendant when mistrial declared); *Paz v. United States*, 462 F.2d 740 (5th Cir. 1972) (one defendant acquitted, eight other defendants convicted on at least some counts).

ber 1, 1977 conveyed only one possible message to the defense, a message too obscene to be printed in this petition. Cf., *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978); *Cohen v. California*, 403 U.S. 15, 20 (1971). If such obscenity has no place in arguments before this Court, it is likewise totally inappropriate to the trial proceedings of a federal district court.

It is difficult to imagine any explanation which this juror could have given for his misconduct which would have established that it was not prejudicial to the defense. Petitioners' constitutional right to be tried by an impartial jury imposed a clear obligation on the District Court at least to inquire into this juror's actions. Its refusal to do so requires that petitioners be granted a new trial.

III

The Court of Appeals erred in holding that no hearing lies to determine whether petitioners' tax returns were acquired in violation of Title VII of the Tax Reform Act of 1976.

The Tax Reform Act of 1976 established the exclusive procedure with which *every* Federal agency must comply in order to lawfully acquire income tax returns from the Internal Revenue Service (IRS) in connection with a non-tax criminal prosecution. The head of the requesting agency (or, in the case of the Justice Department, the Attorney General, Deputy Attorney General or an Assistant Attorney General) must authorize the application for an order directing such disclosure (26 U.S.C. §6103(i)(1)(B)). The application must set forth sufficient facts by

which a judge may determine *ex parte* that: (1) there is reliable information demonstrating reasonable cause to believe that a specific criminal act has been committed; (2) there is reason to believe the information sought is probative evidence of a matter related to such act; and (3) the information sought cannot reasonably be obtained from any other source, or is the "most probative evidence" of such act. (26 U.S.C. §6103(i)(1)(B)(i), (ii) & (iii)). If the judge determines that there has been compliance with §6103 (i)(1)(B), an order is issued directing IRS to turn the requested returns over to the court; the returns must thereupon be reviewed and, if they contain the information suggested by the application, they may be forwarded to the requesting party. If the returns subsequently are offered into evidence at trial, the court must make a further finding that the return "is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party" (26 U.S.C. §6103(i)(4)).

Prior to trial in this case, counsel learned that the Government had obtained copies of the tax returns of several petitioners.* Accordingly, counsel requested disclosure of the application submitted under §6103(i)(1)(B). The Government opposed this request on the ground that an evidentiary hearing did not lie to determine whether §6103(i) had been complied with or violated. The District Court agreed, refusing to turn over the affidavits or to hold any hearing whatsoever. The Court of Appeals affirmed (35a-38a).

* Specifically, the returns of the following persons ultimately were admitted into evidence: petitioners Barnes, Hayden, Monsanto, Hatcher, and Hines; and codefendants Guy Fisher and Wayne Sasso.

A. Introduction

Although this Court has not yet dealt specifically with the Tax Reform Act of 1976, it has held (or assumed) in an unbroken line of decisions that a hearing lies to uncover and remedy violations of federal statutes prescribing the procedures for the acquisition and use of evidence in federal prosecutions. See, e.g., *Nardone v. United States*, 302 U.S. 379 (1937) (*Nardone I*) and *Nardone v. United States*, 308 U.S. 338 (1939) (*Nardone II*) (defendant entitled to evidentiary hearing to determine if evidence or derivative evidence obtained in violation of 47 U.S.C. §605); *Miller v. United States*, 357 U.S. 301 (1958) (defendant entitled to evidentiary hearing to determine if evidence obtained in violation of D.C. Code, 1951, §4-141, 4-145 and 18 U.S.C. §3109); *Reisman v. Caplin*, 375 U.S. 440 (1964) (summonee has right to adversary proceeding to determine if IRS summons was issued in violation of 26 U.S.C. §7602); *United States v. Blue*, 384 U.S. 251 (1966) (*accord*); *Donaldson v. United States*, 400 U.S. 517 (1971) (*accord*); *United States v. LaSalle National Bank*, 437 U.S. 298 (1978) (*accord*). As this Court held in *Blue*:

"[T]his Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in violation of the accused's rights under . . . federal statutes . . ."

384 U.S. at 255 (citations omitted).

Cf., United States v. Caceres, 99 S. Ct. 1465 (1979) (evidence obtained in violation of agency regulation subject to suppression if regulation required to be adopted by federal law or Constitution).

Decision of numerous circuits have also held or assumed that an evidentiary hearing lies to uncover and

correct a violation of a federal statute, including the Tax Reform Act. In *United States v. Genser*, 582 F.3d 292 (3d Cir. 1978), *on remand*, 595 F.2d 139 (3d Cir. 1979), there was a lengthy discussion of appellants' right to a motion to suppress evidence obtained in violation of 26 U.S.C. §7602 and it was held that cases such as *Nardone, Reisman, Blue and Donaldson* "clearly envision such a remedy" (582 F.2d 307-311). In *United States v. Mangan*, 575 F.2d 32, 37-41 (2d Cir. 1978), it was assumed that a motion to suppress was the proper method to challenge an alleged violation of 26 U.S.C. §6103(h) (Tax Reform Act).

Similarly, in *United States v. Miller*, 500 F.2d 751, 756-58 (5th Cir. 1974), *rev'd on other grounds*, 425 U.S. 435 (1976), it was held that the improper acquisition of records under the Bank Secrecy Act (12 U.S.C. §1829(b)) was remediable by a motion to suppress. *Genser* had also been presaged in *United States v. Fruchtman*, 421 F.2d 1019, 1022 (6th Cir. 1970) where it was held that a motion to suppress was the correct method of challenging an alleged violation of 26 U.S.C. §7602.* See also, *United States v. Olson*, 576 F.2d 1267, 1270-71 (8th Cir. 1979) (assumes motion to suppress lies but upholds denial of motion because of absence of proof of illegality of disclosure of returns under §6103(h)); *Patrick v. United States*, 574 F.2d

* *Fruchtman* also supports the proposition that even if there is no absolute right in every case to a full evidentiary hearing, there is a right to the information submitted to the judge who ordered disclosure of the returns in order to determine whether or not to make a motion for such a hearing. In *Fruchtman*, the trial judge gave counsel a confidential IRS report that was the basis of the §7602 summons; the judge also issued a protective order. Both of these actions were approved by the Sixth Circuit. This compromise solution would go far to protect the right of petitioners as well as preventing frivolous and speculative hearings (see, e.g., *United States v. Olson, infra*).

1109, 1115-16 (7th Cir. 1975) (*accord*); *Laughlin v. United States*, 474 F.2d 444, 453 n.12 (D.C. Cir. 1972) (*accord*).

Two district courts also support the right to a hearing under the Tax Reform Act. In *United States v. Tucker*, 316 F.Supp. 822 (D. Conn. 1970), a lengthy hearing was held on a motion to suppress because of an alleged violation of the predecessor statute of the present §6103. Lastly, in *United States v. Vignola*, 464 F.Supp. 1091, 1094 (E.D. Pa. 1979), the trial judge granted a mid-trial severance on tax counts because "During the trial a question arose as to the legality of the procedures employed by the prosecution in obtaining disclosure of the defendant's tax returns from the Internal Revenue Service . . . [under 26 U.S.C. §6103(h)] and [w]e believed that *an evidentiary hearing* might well be necessary to resolve this dispute . . ." (emphasis added).*

Although none of these cases dealt with the specific right to an evidentiary hearing under present 26 U.S.C. §6103(i), they do stand for the general proposition that "some kind of a hearing" is required whenever it is alleged that a federal statute governing the acquisition of

* The Senate Finance Committee that wrote the bill that ultimately became 26 U.S.C. §6103(i) was well aware that by the early 1970's millions of tax returns were being obtained by federal agencies from IRS each year (see, in general, Report to the Administrative Conference of the United States on Administrative Procedures of the Internal Revenue Service, Sen. Doc. 94-266, 94th Cong. 2d Sess. at 832, 855 (October 1975)), and that "one of the biggest users of the tax information . . . is the Department of Justice." For example, in 1975, the Strike Force alone requested and received 8,103 tax returns of 1,711 taxpayers, and the U.S. Attorneys requested and received 17,678 tax returns of 4,330 taxpayers. See, [1976] U.S. Code Cong. and Admin. News at 3746-47, 3757. And this use is increasing. Comment, *The Need for Reform of the Informational and Evidentiary Uses of Tax Returns in Non-Criminal Tax Prosecutions*, 14 Am. Crim. L.Rev. 163, 181 n.119 (1976).

evidence has not been complied with. *See, generally, Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 passim (1975).* It is petitioners' primary contention that there is simply no way in which it can be determined if there was compliance with the "severe procedure" (*United States v. Mangan, supra*, 575 F.2d at 38) mandated by §6103(i) except upon disclosure of the information submitted to the issuing judge.

For example, there is grave doubt whether the application to the district court was even properly authorized in the first instance. Since the Drug Enforcement Administration was presumably the requesting agency, and since it is part of the Justice Department (Reorg. Plan No. 2 of 1973, §4 (set forth in App. II to 5 U.S.C.)), such authorization could only come from the Attorney General, Deputy Attorney General or an Assistant Attorney General. §6103(i)(1)(B). Improper authorization would require suppression. Cf., *Giordano v. United States*, 416 U.S. 505 (1974). There is a serious question whether the affidavits complied with the "severe procedure" of §6103(i)(1)(B) (i)-(iii). Furthermore, there is a question whether the post-order predisclosure *in camera* review of the returns contemplated by §6103(i)(1)(B)—but not set forth in the statute (*United States v. Praetorius*, 451 F.Supp. 371, 373 (E.D. N.Y. 1978))—was made or whether the returns were simply forwarded directly to the Government by IRS, as was the practice prior to the statute. *See, e.g., United States v. Costello*, 255 F.2d 876, 882-83 (2d Cir. 1958).

Since the district court refused to turn over the affidavits or hold any hearing, we are forced to speculate as to the defects in the Government's acquisition of the returns. Three factors, however, suggest the probable presence of

such defects. First, the statute was relatively new, having gone into effect on January 1, 1977, only three months before this indictment was returned. Second, the statute completely changed (and complicated) the procedure for obtaining these returns, which had previously consisted of a simple telephone call to IRS. *See, United States v. Costello, supra.* Third, not every procedure contemplated by the statute is clearly set forth therein. *United States v. Praetorius, supra.*

The foregoing, in sum, demonstrates both that there was a high probability of substantial defects in the disclosure proceedings and the clear need for an evidentiary hearing to determine the extent and effect of such defects.

Despite the obvious need for a hearing, and in the face of all of the authority supporting petitioners' right to such a hearing, the Court of Appeals held that none was required both because a hearing was not explicitly mentioned in the statute and because other remedies for violations of the statute existed. Neither ground can withstand careful analysis.

B. The Requirement of a Hearing

In determining whether a right to a hearing inheres in §6103(i)(1), recourse to the Congressional debates and reports accompanying both the 1976 Tax Reform Act and its progenitor, the Privacy Act of 1974, makes clear that a hearing was intended to vindicate the right to, and reasonable expectation of, privacy that is implicit in tax return information.*

* The close relationship between the Privacy Act and the Tax Reform Act—and the knowledge of the weaknesses of the former possessed by the drafters of the latter—appears again and again in the legislative history of the Tax Reform Act. *See, generally, [1976] U.S. Code Cong. and Admin. News at 3747 et seq.*

Although most taxpayers assumed that their returns were confidential, in fact they were "public records". *See former 26 U.S.C. §6103(a).* And despite the existence of regulations which attempted to give tax return information a degree of confidentiality, there was "much abuse" of the regulations ([1976] U.S. Code Cong. and Admin. News at 3455), and they were often completely ignored by the Department of Justice. *See, e.g., United States v. Costello*, 255 F.2d 876, 882-83 (2d Cir. 1958) (IRS disclosure of tax return information to U.S. Attorney on basis of telephone request).

Congress previously had tried to "limit the broad availability of Federal income tax returns to agencies unconcerned with the collection of revenues" in the Privacy Act of 1974 (5 U.S.C. §552(a) (Supp. IV, 1974), 88 Stat. 1896). *See, Comment, The Need for Reform of the Informational and Evidentiary Use of Tax Returns in Non-Tax Criminal Prosecutions*, 14 Am. Crim. L. Rev. 163, 184-185 (1976).

As part of this Act, Congress set up the Privacy Study Commission to report on the operation of the Act. (*See, 5 U.S.C. §552(a)* (Supp. IV, 1974)). In June, 1976, the Commission issued a report entitled "Federal Tax Return Confidentiality," making the extraordinary finding that the Internal Revenue Service had managed to "side-step the purposes of the Act." Thereafter, the report set forth the Commission's six-part recommended procedure for insuring the confidentiality of Federal tax returns. (*Id.* at 59-62). While the Privacy Act was not amended to include this procedure, Section 6103(i) of the Tax Reform Act repeats almost *verbatim* the Commission's specific recommendations.

It is, therefore, noteworthy that the Privacy Commission's report specifically acknowledged that:

"... when an agency seeks to compel tax information directly from the taxpayer . . . the taxpayer has an opportunity . . . to suppress use of it once it has been obtained."

Id., at 57 (emphasis added).

The Privacy Commission ultimately concluded that:

"a Federal law enforcement agency should not have easier access from the [Internal Revenue] Service than from the taxpayer . . . [and] from this conclusion, moreover, it follows that the procedural protections for the taxpayer . . . should be comparable to those the taxpayer would have if the requesting agency was demanding the information from him directly."

Id., at 58 (emphasis added).*

Furthermore, the comments of the Congressional Finance Committee that drafted §6103(i) show that the use of language similar to that in the search-warrant and wiretap order statutes was intentional, and its intent was to remedy the loopholes in the Privacy Act:

"The [Senate Finance] Committee decided that the information that the American Citizen is compelled by tax laws to disclose to the Internal Revenue Service was *entitled to essentially the same degree of privacy*

* Despite the reference to "suppression" in the Commission's report, there is no specific reference to "a motion to suppress" in the wording of the proposed regulations. This is further evidence that the mere absence of reference to a hearing in §6103 does *not* show that such a hearing was not contemplated therein.

as those private papers maintained in his home. [*] Present law and practice does not afford him that protection—the Justice Department and other Federal agencies, as a practical matter, being able to obtain that information for non-tax purposes almost at their sole discretion. The Committee decided, therefore, that the Justice Department and any other Federal agency responsible for the enforcement of a nontax criminal law should be required to obtain court approval for the inspection of a taxpayer's return or return information. . . ." Senate Report No. 94-938 at 328, reprinted in [1976] U.S. Code Cong. and Admin. News at 3757-58.

Prior to the Tax Reform Act,

"Questions [had] been raised and substantial controversy created as to whether the present extent of actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes breaches a reasonable expectation of privacy on the part of the American citizen with respect to such

* This language has clear Fourth Amendment implications, despite the fact that §6103(i)(1) does not deal with the usual "search and seizure" situation. As this Court noted almost 100 years ago in *Boyd v. United States*, 116 U.S. 616, 630 (1886):

"It is not the breaking of his doors and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . Breaking into a house and opening drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's . . . private papers to be used as evidence to convict him of crime . . . is within the condemnation of . . . Fourth and Fifth Amendments . . ."

See also, *Weeks v. United States*, 232 U.S. 383, 393 (1914).

And, of course, in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), this Court had used almost precisely the same language as the Privacy Protection Commission and the Senate Finance Committee in holding that the protection of the Fourth Amendment applied where an individual harbored a reasonable "expectation of privacy"—exactly what §6103(i) envisioned for petitioners here.

information. This, in turn, ha[d] raised the question of whether the public's reaction to this possible abuse of privacy would seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system."

[1976] U.S. Code Cong. and Admin. News at 3747.*

Accordingly, the Tax Reform Act specifically amended the administrative provisions of the Internal Revenue Code to change the status of tax returns from public papers to confidential documents in order to strengthen taxpayers' right of privacy. [1976] U.S. Code Cong. and Admin. News at 3439, 3455, 3747. As the Chairman of the House Ways and Means Committee said: "The Conference report [on H.R. 10612, which eventually became the Tax Reform Act] . . . includes a series of very important administrative changes. These protect taxpayers' rights with respect to tax return disclosure . . ." Statement of Cong. Al Ullman (reprinted in 26 U.S.C.A., Tax Reform Act of 1976, at xiii).

The resemblance between §6103 and the procedure for obtaining a search warrant or wiretap order is readily apparent and, in view of the legislative history set forth above, quite deliberate. In fact, when §6103(i)(1)(B) was originally drafted it required "probable cause" and it was specifically noted that this standard "is intended to be less

* The concern of Congress that non-confidentiality of tax returns could impair the ability to voluntarily collect taxes was echoed recently in a report of the Association of the Bar of the City of New York, wherein it was noted that "widespread use of tax return information diminishes a taxpayer's disposition to cooperate with the [Internal Revenue] Service by voluntarily filing an accurate tax return." Committee Report on Access to Federal Income Tax Returns, 34 The Record 376, 377-78 (May/June 1979).

strict than the . . . standard . . . for issuing a search warrant." (House Conference Report No. 94-1515 (Joint Explanatory Statement of the Committee of Conference) at 482, *reprinted in* [1976] U.S. Code Cong. and Admin. News at 4186). This awareness of the analogy between §6103(i)(1)(B)(i) and traditional search warrant statutes, despite the difference in quantum of proof, is further support for implying a motion to suppress.*

This analogy was highlighted by Judge Friendly when he wrote *United States v. Mangan*, 575 F.2d 32 (2d Cir. 1978). The precise issue in *Mangan* was whether charges against the appellants pertained to *tax administration* under §6103(h) or were *nontax* matters under §6103(i) (575 F.2d at 39). Although it was ultimately decided to be the former, Judge Friendly went on at great length to discuss the "more severe procedure" that would have applied had it been the latter.** (*Id.*, 575 F.2d at 38-41 & nn. 6-7). It was, therefore, erroneous for the Majority to assert that Judge Friendly was discussing the statute "in a different context."

* In one of this Court's landmark decisions, it was specifically noted that the Fourth Amendment applies to police conduct based on less than "probable cause." *Terry v. Ohio*, 393 U.S. 1, 19 (1968). Congress obviously had cognizance of *Terry*, and in light of this knowledge, the absence of specific reference to a motion to suppress takes on less significance.

** The previously mentioned City Bar Association Report noted that there is a difference between the degrees of expectation of privacy in tax returns when they are used in tax and nontax prosecutions: "All citizens should expect their returns to be scrutinized . . . for tax law violations . . . The considerations are quite different, however, when tax return information is sought for use in non-tax investigations. In seeking such access, the government is probably going beyond the citizen's justifiable expectations as to the extent of his personal privacy." (34 The Record at 381).

Mangan is also relevant for another equally important reason. Although the request for a hearing in this case was cast in terms of a "motion to suppress", a finding that such a motion does not lie does not end the matter. Compliance with the disclosure provisions of §6103(i)(1) is a condition precedent to *admission* under §6103(i)(4), not as a matter of constitutional law but because §6103(i)(4) specifically conditions admissibility "on compliance with provisions governing disclosure . . ." *United States v. Mangan, supra*, 575 F.2d at 41.

Therefore, were it found at a hearing that the disclosure provisions had not been complied with, then the returns could not be *admitted*, not because the Constitution had been violated, but because the statute specifically "... keys admissibility of returns . . . to compliance with one of the procedures prescribed in the earlier subdivisions with respect to disclosure to a Federal Agency." (*Id.*, 575 F.2d at 39). Accordingly, even in the absence of constitutional considerations, a hearing is necessary simply to determine if the statute was complied with.

Last, but of equal importance, it must be noted that in none of the cases previously cited as requiring a hearing to determine if a federal statute was violated was there any explicit provision in that statute, or any related statute, directing that any such hearing be held. Yet, with the exception of *Genser*, where the issue was resolved in favor of petitioners, not a single court even paused to consider this "omission."*

* It is true that cases such as *Reisman, Donaldson* and *LaSalle National Bank* were subpoena cases where the procedural device giving rise to a hearing was a motion to quash. The clear and close

(footnote continued on next page)

B. The Existence of Alternate Remedies

The conclusion that an evidentiary hearing is required is not altered one iota by the existence of other remedies for violations of the statute. It is a well-known canon of statutory construction that the existence of one sanction does not imply the exclusion of others. Davies, *The Interpretation of Statutes*, 35 Col. L. Rev. 519, 527-28 (1935). And this is particularly true where, as here, existing sanctions are not in the same section of the law but in other sections of more general application. Compare, *The Financial Institutions Regulatory and Interest Rate Control Act*, Pub. Law. 95-630, §1117(a) (remedies for any violation of the Act are "exclusive").

In *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), the existence of a motion to suppress was held not to preclude a monetary damage suit for the same violation of rights. Clearly, the converse must also be true in order to "make good the wrong done" (*Id.*, 403 U.S. at 396). This is particularly true where, as here, the alleged "alternative sanctions" would involve, in effect, the Government suing itself.

Similarly, in *Franks v. Delaware*, 438 U.S. 154, 169 (1978), the argument that a motion to suppress should not

relationship between motions to quash and suppression motions, however, renders the procedures of these cases applicable to §6103(i). For instance, both *Donaldson* and *LaSalle* use language peculiar to suppression proceedings: "material in question . . . would be subject to suppression . . ." (400 U.S. at 531); rule forbidding use of §7602 subpoena to gather evidence for criminal tax investigations is a "prophylactic restraint" (437 U.S. at 312-313). As the Third Circuit said in *Genser*, *supra*, 582 F.2d at 308: "To make available the remedy of suppression to taxpayers in cases such as the present is merely to ensure governmental compliance with the principles enunciated in . . . *Donaldson*, *LaSalle* [and other cases] . . ."

lie because of "alternative sanctions" was rejected in language highly apposite here:

[T]he alternative sanctions of a perjury prosecution, administrative discipline, contempt, or civil suit are not likely to fill the gap. *Mapp v. Ohio* implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp*, 367 U.S. at 670, where he quoted from *Wolf v. Colorado*, 338 U.S. 25, 42 (1949): 'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.'

Finally, in many of the cases previously cited as requiring a hearing, the statute allegedly violated also contained other sanctions for non-compliance. See, e.g., *Nardone v. United States*, *supra*, 302 U.S. at 381 (§501 of Communications Act penalized violation of §605 by "fine and imprisonment"); *LaSalle National Bank, Donaldson, Genser and Fruchtman*, *supra* (26 U.S.C. §§7213(a), 7217 provide criminal and civil penalties for violating §7602). And, once again, in none of these cases did the courts even pause to consider whether the existence of the other "remedies" deprived a defendant of "some kind of hearing."

The decision of the Court of Appeals, effectively emasculating the confidentiality and non-disclosure provisions of §6103(i), deprives taxpayers of any meaningful remedy for the deprivation of their right of privacy and raises the spectre of increased non-compliance with the tax collection system. This Court should grant certiorari to decide whether that decision, and the consequences thereof, should be allowed to stand.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 17, 1979

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052,
1053, 1056, 1057—September Term, 1977.

(Argued June 22, 1978 Decided April 23, 1979.)

Docket Nos. 78-1040, 1045, 1050, 1051, 1056,
1058, 1059, 1060, 1061, 1063, 1067

UNITED STATES OF AMERICA,

Appellee,

—against—

LEROY BARNES, a/k/a "NICKY", STEVEN BAKER, a/k/a
"JERRY", STEVEN MONSANTO, a/k/a "FAT STEVIE", JOHN
HATCHER, a/k/a "Bo", JOSEPH HAYDEN, a/k/a "JAMES
HAYDEN", a/k/a "FREEMAN HAYDEN", a/k/a "JAZZ",
WALLACE FISHER, LEON JOHNSON, a/k/a "J.J.",
WAYMIN HINES, a/k/a "WOP", LEONARD ROLLOCK, a/k/a
"PETEY", JAMES MCCOY, WALTER CENTENO, a/k/a
"CHICO BOB",

Defendants-Appellants.

Before:

MOORE, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

Eleven defendants appeal from judgments of the District Court for the Southern District of New York (Honorable Henry F. Werker, *District Judge*), convicting them

after a jury trial of conspiracy to violate the narcotics laws and substantive offenses consisting of possession and distribution of heroin and cocaine and illegal possession of a firearm by defendant James McCoy. Appellant Leroy Barnes also appeals his conviction for managing a continuing criminal enterprise. We affirm the convictions of all defendants on all counts.

ROBERT B. FISKE, JR., United States Attorney for the Southern District of New York (Thomas H. Sear, Robert B. Mazur, T. Barry Kingham, Lawrence Pedowitz, Richard D. Winberg, Robert J. Jossen, Assistant United States Attorneys, of counsel), *for Appellee.*

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JOSEPH T. KLEMPNER, Esq., New York, N.Y., *for Appellant Johnson.*

MARK S. ARISOHN, Esq., New York, N.Y., *for Appellant Hines.*

MELVYN SCHLESSER, Esq., New York, N.Y. (Bobick, Deutsch & Schlesser, of counsel), *for Appellant Rollock.*

J. JEFFREY WEISENFELD, Esq., New York, N.Y. (Steven M. Jaeger, on the brief), *for Appellant McCoy.*

BARRY BOHRER, Esq., New York, N.Y. (Bohrer and Ullman, of counsel), *for Appellant Centeno.*

MOORE, Circuit Judge:

Leroy ("Nicky") Barnes, Steven Baker, Steven Monsanto, John Hatcher, Waymin Hines, Leonard Rollock, James McCoy, Walter Centeno, Leon Johnson, Joseph Hayden, and Wallace Fisher appeal from judgments of conviction entered on January 19 and 23, 1978, in the United States District Court for the Southern District of New York after a ten-week trial before the Honorable Henry F. Werker, *District Judge*, and a jury. The defendants were convicted of conspiracy to violate the federal narcotics laws, in violation of 21 U.S.C. § 846, and of various substantive violations thereof (21 U.S.C. §§ 812, 841(a)(1), and 841(b)(1)(A)). In addition, defendant Barnes was convicted of engaging in a continuing criminal enterprise involving narcotics, in violation of 21 U.S.C. § 848, and defendant McCoy was convicted of unlawful

possession of a firearm during the commission of a federal felony (18 U.S.C. § 924(c)(2)).

Those defendants who appeal have submitted a Joint Brief (J.Br.) of 94 pages and a reply brief of 71 pages covering common issues on appeal. In addition, separate briefs have been filed by individual appellants as to issues that apply more particularly to them. In view of the complexity of the issues raised on appeal, we set forth a summary of the charges in the indictment, insofar as it relates to appellants, followed by a brief chronological sketch of the narcotics investigation which led to the instant prosecution, the facts of which were presented to the jury during the ten weeks of trial.

THE INDICTMENT

Count ONE charged a conspiracy by Barnes, Baker, Monsanto, Hatcher, Hayden, Wallace Fisher, Hines, Rollock, McCoy, and Centeno to violate the narcotics laws of the United States, 21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A), 846. The object was the possession and distribution of heroin and cocaine. Thirty-three overt acts were alleged. Additional defendants named in this count included Guy Fisher, Gary Saunders, Wayne Sasso, and Brenda Sasso. The jury failed to reach a verdict as to Guy Fisher. Saunders and Wayne Sasso were acquitted. The charge against Brenda Sasso was dismissed by the court.

Count Two charged Barnes with operating a "continuing criminal enterprise" to violate 21 U.S.C. §§841(a)(1) and 841(b)(1)(A) in concert with five or more other persons with respect to whom he occupied a position of organizer, supervisor, or manager, and from which enterprise he obtained "substantial income or resources". 21 U.S.C. §848.

The Substantive Narcotics Violation Counts

21 U.S.C. §§812, 841(a)(1) and 841(b)(1)(A),
and 18 U.S.C. §2

1. *The Heroin Charges*

Count THREE charged Barnes, Baker, Monsanto, McCoy, and Fisher with possessing and distributing approximately 445 grams of heroin on or about December 29, 1976.

Count Four charged Barnes, Hatcher, and Fisher with possession and distribution of approximately 457 grams of heroin on or about March 11, 1977.

Count Five made the same charge against Barnes, Hines, and Centeno, the date being on or about March 14, 1977, and the amount being 892.7 grams.

Count SEVEN charged Baker and McCoy with possession and distribution of some 191 grams of heroin on or about March 1, 1977.

Count ELEVEN charged Barnes, Rollock, and Fisher with possession and distribution, on or about November 29, 1976, of 107.6 grams of heroin.

2. *The Cocaine Charges*

Count TWELVE charged Johnson with possession and distribution, on or about December 4, 1976, of some 24.1 grams of cocaine.

Count THIRTEEN charged Johnson with possession and distribution of 99.5 grams of cocaine on or about December 14, 1976.

The Firearms Violations

Count EIGHT charged McCoy with carrying a firearm, on or about March 15, 1977, during the commission of a federal felony, in violation of 18 U.S.C. § 924(c)(2).

In addition, McCoy and Centeno were charged with separate firearms violations. Count Six, in which Centeno was charged, was dismissed at the close of the Government's case. The jury acquitted McCoy under Counts NINE and TEN.

THE INVESTIGATION

Apparently as a result of a New York State narcotics investigation, Inez Smart, a narcotics "activist", was arrested in March 1977. She agreed to cooperate and testified at trial. Her testimony, in substance, was that, in October 1974, she had met the defendant Barnes through a Richard Smith; that Barnes had desired to purchase quinine (a narcotics cutting material) in large quantities (\$150,000 worth a month) at \$25 an ounce; and that, upon delivery of 1000 ounces, Smith and Barnes had paid her \$25,000. Further quinine transactions took place during 1975.

In December 1974 police officers stopped a Mercedes Benz leased by Barnes from Hoby Darling Leasing Corporation and driven by Barnes. Richard Smith and one Robert Monroe were passengers. In the trunk of the car the police found over \$132,000 in cash, mostly small bills.

In November 1976 the Drug Enforcement Administration (DEA), in an effort to uncover sources of drug traffic in Harlem and the South Bronx, enlisted, for a financial consideration and witness protection, the services of Robert Geronimo. He had grown up in the South Bronx and was friendly with many of the defendants. Geronimo also was familiar with the Kingdom Auto Leasing Corporation in the Bronx, owned by Guy Fisher and apparently used by the Barnes organization narcotics dealers to avoid car forfeiture if narcotics were found therein.

In November 1976, Geronimo, in an effort to infiltrate what was believed to be the Barnes organization, called

upon Wallace Fisher, a younger brother of reputed Barnes confederate Guy Fisher, in an endeavor to enlist his services. At about this same time, undercover agent Louis Diaz of the DEA appeared with money to make substantial purchases. Geronimo represented Diaz to Wallace Fisher¹ as his Italian cousin with money to make narcotics purchases.

On November 29, 1976, for the sum of \$8,300 (\$8,000 for the narcotics and \$300 for Fisher), one-eighth of a kilogram of heroin was sold by Rollock to Geronimo and Diaz. This transaction formed the basis for Count ELEVEN of the indictment. Rollock and Fisher were convicted on this charge; Barnes was acquitted.

"Money-washing" is apparently an important step in the narcotics business. It involves the conversion of many small bills into larger denominations. In mid-December 1976, at the Hubba Hubba Social Club in Harlem, Barnes asked Fisher whether he and Geronimo could handle a "wash". This was accomplished at a downtown bank by Diaz and Wayne Sasso (who was acquitted of the conspiracy charge arising from this transaction). Defendant Hayden, when told of the success of the "wash", expressed his satisfaction with the operation.

Shortly thereafter, on an occasion when Barnes met Fisher at Bubba Jean's Emporium, Barnes asked Fisher why he (Fisher) and Geronimo had gone to Rollock; Barnes directed that, for any further deals, Fisher and Geronimo should see defendant Monsanto ("Fat Stevie"). A deal was consummated subsequently at the Harlem River Motor Garage, whereat Geronimo gave \$21,000 to Monsanto, who in turn gave Geronimo one-half kilogram of heroin which,

¹ Hereinafter, "Fisher" will refer only to defendant Wallace Fisher. Any reference to Guy Fisher will include his full name.

according to the conspirators,^{8,3} had come from defendant Baker. McCoy and Monsanto proceeded to count the money as Geronimo left the premises. Barnes, Baker, Monsanto, McCoy and Fisher were convicted for this transaction, which was Count THREE.

On about March 11, 1977, a sale of a half-kilo, at the price of \$35,000 (as agreed between Hatcher and Geronimo), was made by defendant Hatcher, through Fisher, to Geronimo and Agent Diaz, delivery taking place at the Harlem River Motors Garage. The package containing the heroin had the name "Bo" (which was Hatcher's nickname) written on it. This transaction, the subject of Count FOUR, resulted in the conviction of Hatcher and Fisher; Barnes was acquitted, despite evidence to the effect that Barnes had been in the office area watching Diaz's comings and goings.

While Diaz and Geronimo were continuing their "infiltration" efforts, the DEA was attempting to find other means to obtain evidence. Hence, during late summer and early fall of 1976, the DEA enlisted the services of two additional informers, Promise Bruce and Robert Wooden. Bruce was in jail at the time he was approached, but was reputed to know Barnes, Johnson, Hines and Guy Fisher and to have discussed obtaining heroin with Barnes and Guy Fisher during 1974. After his release from prison, Bruce purchased cocaine from Johnson on about December 3 and 13, 1976. For these two sales Johnson was convicted under Counts TWELVE and THIRTEEN.

Later in December, Bruce proposed exchanging "cut" for heroin. On two occasions Bruce delivered samples of quinine and mannite (a cutting narcotic) to Johnson, to be taken by him to Barnes for his approval. Apparently the quinine was the wrong kind and the price was out of line. Further negotiations ensued, and in early February 1977

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Bruce discussed such an "exchange" transaction directly with Barnes. When Hayden joined them, Barnes inquired as to the quantity of cut that Bruce had on hand. After hearing his reply and after asking Hayden about his (Hayden's) stock of "cut", Barnes told Bruce that they did not need any "cut" at that time.

Bruce continued to push his exchange program and, after unfruitful discussions with Monsanto, made a deal for the exchange of "cut" and cash for one-quarter kilo of heroin. The deal was consummated on or about March 1, 1977 by the delivery to defendants Baker and McCoy of some 44 kilograms of mannite and \$2,000 for the one-quarter kilo. Baker and McCoy were both convicted on this count (Count SEVEN).

Bruce continued in his efforts to purchase heroin. In early March 1977, he met the defendant Waymin Hines, who agreed to sell 250 "quarters"² of heroin for \$10,000 and to provide samples so that the weight and quality might be checked. Bruce then waited at Julia's Bar with DEA Agent Mary Buckley for delivery of the samples. Shortly thereafter defendant Walter Centeno arrived and gave Bruce two "quarters". The four—Bruce, Buckley, Centeno and Hines—left the bar and reassembled at an agreed-upon location, at which time \$10,000 was given to Hines. Hines, in turn, designated the time and place of delivery of the 250 "quarters", which were delivered to Agent Buckley by Centeno, who gave his name as "Chico Bob". Hines and Centeno were convicted on this count (Count FIVE); Barnes was acquitted.

Wooden's testimony as an informer relates to Monsanto and Baker. Wooden, posing as a customs agent in 1974,

² A "quarter", or "street quarter", refers to a quantity of approximately 4 grams of 1.5 percent pure heroin—a package of ten sold to users of the drug. See Gov't Br. 5 n.*

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had met Monsanto. During the course of their friendship, Monsanto told Wooden that he (Monsanto) sold heroin. He asked whether it would be possible for him (Wooden), as a customs agent, to permit the importation of 300 pounds of heroin into the country. It was after this event that Wooden began to cooperate with the DEA. Wooden and Monsanto conducted business both in "cut" and heroin, Wooden delivering a case of "bonita" (a cutting material) to Monsanto for \$700 and buying an ounce of heroin for \$1500, the cash being paid to Monsanto at the Harlem River Motor Garage. Baker was present when the money was given to Monsanto, and was introduced to Wooden as Monsanto's partner. No charge was brought relating specifically to this transaction.

Other evidence included testimony of numerous conversations in which "Nicky" was referred to by Fisher and others, and general conversations regarding negotiations, unconsummated deals, and identifications of persons who arrived at various subject locations just before or just after a transaction was completed.

The jury began to hear evidence on September 29, 1977, before the Honorable Henry F. Werker. On December 2, after deliberations lasting three days, eleven defendants were convicted.

THE ISSUES ON APPEAL

I.

Appellants' opening and much stressed argument deals with the manner in which the court conducted the *voir dire* examination of the potential jurors and its insistence on their anonymity. More specifically they claim that:

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"The district court's refusal to disclose petit jurors' identities, residence locales or ethnic backgrounds and the court's restrictive *voir dire* denied defendants due process." (J.Br. 5).

They also assert as reversible error the court's failure to inquire into the religion of each prospective juror. Using as their authority Clarence Darrow, who believed that a juror's "nationality, his business, religion, politics, social standing, family ties, friends, habits of life and thought; the books and newspapers he likes and reads . . . [even to his] method of speech, the kind of clothes he wears, the style of haircut . . .", were important subjects for questioning, they contended that the court's inquiry was unduly (to the point of reversal) restrictive. (J.Br. 5, quoting Darrow, *Attorney for the Defense*, Esquire Magazine, May 1936). Substantially before Darrow, even Blackstone, also quoted by appellants, said: "The peremptory challenges of the prisoner must however have some reasonable boundary." 4 Blackstone 347 (1769). Appellants themselves recognize this limitation, saying: "[I]t is not asserted that defendants ordinarily are entitled, in each and every case, to *voir dire* prospective jurors on their ethnic or religious backgrounds"; but they claim "at the very least, their 'neighborhood' or township within the County" should have been disclosed, and that, if names and addresses were properly withheld, then the court should at least have inquired about prospective jurors' ethnic background in order to facilitate the intelligent exercise of peremptory challenges. (J.Br. 12 n.*).

In view of the challenge to the jury selection procedure adopted by the district court, a review of the some 524 pages of the transcript covering the *voir dire* must be made.

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There were 15 defendants. All but one, a Hispanic, were black. The charges were serious—the distribution of massive quantities of narcotics on the streets of Harlem and the South Bronx from which enormous profits were realized—an operation which had continued over a period of years. There had been much pre-trial publicity, particularly centering around the activities of the alleged ringleader, the defendant Barnes. Further, the "sordid history" of multi-defendant narcotics cases tried in the Southern District³ was sufficient to put the trial court on notice that

3 As the Government points out,

"The trial court was well aware, as is this Court, of the sordid history of attempts at influencing witnesses and jurors in cases such as these. See, e.g., *United States v. Pacelli*, 521 F.2d 135 (2d Cir. 1975) [cert. denied, 424 U.S. 911 (1976) (Pacelli, indicted for narcotics violations on the grand jury testimony of witness Parks, convicted of conspiracy to cause Parks' death)]; cf. *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1275 (2d Cir. 1975) [cert. denied, 423 U.S. 937 (1975) (noting the peril surrounding the lives of narcotics agents; no error to close courtroom during agents' testimony)]."

Gov't Br. 66. See also *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir. 1978) (in multi-defendant narcotics prosecution, no error to hold *in camera* hearings, without all defendants present, under circumstances of case, which included death threats made to cooperating witnesses).

Furthermore, prior to trial, the Government, in its sequestration papers (11th Supp. Record on Appeal, Document No. 221, Envelope ordered sealed by district court), directed Judge Werker's attention to three recent Southern District cases in which there had been attempts to influence jurors: (1) *United States v. Alvarez* (Moten) was a 22-defendant narcotics case tried before Judge Owen. About six weeks into the trial, a defense attorney informed Judge Owen that a co-defendant had suggested the possibility of bribing a juror; later, the juror had approached a defendant's sister. The juror was replaced, and defendant Moten subsequently won the opportunity to interview other jurors in the hopes of obtaining a new trial. *United States v. Moten*, 582 F.2d 654 (2d Cir. 1978); *United States v. Moten*, 564 F.2d 620 (2d Cir.), cert. denied, 434 U.S. 942, 959, 974 (1977); *In re Grand Jury Subpoena served upon Doe*, 551 F.2d 899 (2d Cir. 1977). (2) *United States v. Stansione*, No. 73 Cr. 994, tried before Hon. Thomas P. Griesa, Jr., involved a juror who, during the course of deliberations in the second trial of the matter, suddenly suffered "chest

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all safety measures possible should be taken for the protection of prospective jurors, including complete anonymity, namely, no disclosure of name or address. In addition, their rights of privacy had to be respected except insofar as their views might relate to the specific charges to be submitted to them.

The court called 150 potential jurors. To each was assigned a number. Individual examination followed to winnow out for cause. The court had received in advance from both Government and defendants alike lengthy lists of questions which they requested the court to ask the prospective jurors. The Government submitted 45 questions; respective counsel for Barnes, Hayden, and Fisher, 108, which included questions relating to their general attitude towards black people and their feelings towards them.

The substance of these many requests, with the exception of ethnic background and religion, were embodied in the court's questions. None of the crimes charged related to any specific ethnic background, nor to any religion. Rather, they concerned simply allegations of narcotics trafficking committed by blacks. Potential prejudices in these fields were fully covered by the court.

The court first addressed a number of questions to the entire panel. These questions included the usual questions pertaining to whether the prospective jurors knew any of the alleged participants or attorneys involved in

pains", resulting in a mistrial. Judge Griesa thought the circumstances suspicious, and stated on the record that the juror might have been "reached"; (3) *United States v. Tutino, et al.*, No. 75 Cr. 1038, was a narcotics case before Judge Cooper. All of the defendants were acquitted, but the Government received information concerning contacts with jurors on behalf of certain of the defendants. The grand jury investigation that ensued was publicized as a result of articles in New York newspapers based on disclosures by witnesses who had testified before the grand jury.

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the case; whether they could accept and apply the law as instructed by the court; whether they had any feelings about undercover agents, paid informants, or electronic surveillance which would prevent their fair judgment of the case; whether they, or close friends or relatives, had had any prior experiences with narcotics or with firearms which would prevent fair consideration of the case; whether they had seen or read anything that would influence their judgment; and whether they would be able to sit during a rather lengthy trial. The entire panel was also asked to make known to the court whether they had ever had any contact with any individuals or businesses which would be referred to during the trial, including the Harlem River Motors Garage, various social clubs, and various persons, including even the doorman at the Hubba Hubba Club. The list was quite lengthy, but only two responded that they, or their close friends or relatives, had knowledge of the named persons or places.

After many prospective jurors were excused for cause, the court addressed the following types of questions to the individual prospective jurors. All jurors were asked the county of their residence, and the length of time they had resided in that county. Family history was elicited: each prospective juror was asked about marital status and whether he/she had any children. Furthermore, each was asked about his or her own occupation and, if he or she had a family, about the occupations of spouse and/or children.

All prospective jurors were also asked about their educational backgrounds, and about membership in any organized group, club, or fraternal organization.

Each was also asked whether he/she or close friends or relatives had ever had dealings with agents or officers

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of the DEA, the New York Drug Enforcement Task Force, the New York City police, or any agency of Government dealing with narcotics; if there was an affirmative response, the prospective juror was asked whether the previous contact had created any opinion. All prospective jurors were also asked about any family member's or friend's employment with the Federal Government or with any federal or state investigating agency, etc., which could support a tendency to favor the Government. Furthermore, each was asked whether he/she had any opinion about the courts, defense attorneys, prosecutors, and/or law enforcement officers, that would prevent fair judgment of the case, and whether he/she had been involved in any suit with the United States; whether he/she or a friend or family member had ever previously been a juror or had ever been charged with a crime or been under subpoena, or had ever been a complainant.

All were asked about health problems, including potential family health problems. Further, all were asked whether they had previous knowledge of the indictment, and whether they had read anything about the case.

Specific questions concerning attitude toward blacks were addressed to each juror as well.⁴ The court first asked what the prospective juror's "general attitude toward blacks" was; to further probe, the court then asked

⁴ Examples of the specific questions asked of those who were accepted as jurors are: "Can you tell us what your general attitude is toward black people?"; "Have you had any experience with any member of any race, creed or color other than your own which has resulted in any kind of civil or criminal confrontation in any court of law?"; "Have you any experience at your place of employment or residence or school which would make you feel you could not fairly judge a person of a different race, creed or color?"; "Are you in general prejudiced against persons of another race, creed or color so you feel that you could not fairly consider and decide this case on the evidence?" See Tr. 387-88 (*Voir dire* of No. 1 juror).

whether the prospective juror had ever moved to a different area because he/she had been disturbed by changing conditions. The court asked whether the prospective jurors had had any experience with persons of other races, creeds, or colors resulting in civil or criminal confrontations, or whether he/she had ever had any experiences with persons of different races arising out of employment, residence, or school situations, which might make the juror feel that he/she could not fairly judge such persons. Most were also asked whether they felt that they were generally prejudiced against persons of other races.

There were many instances in which the prospective jurors admitted some prejudice or tendency to favor the Government, and they were excused. (E.g., Tr. 144, 193, 196, 197, 384, 435). Several admitted that they had moved because of "changing conditions" in their neighborhoods. (E.g., Tr. 329, 338, 382, 470 [because of narcotics entering neighborhood]). Several admitted some prejudice against blacks. (E.g., Tr. 385, 448, 499). These were excused. Further, after the panel was sworn, and before the alternates were selected, juror No. 5 told the court that he had been mugged on his way home the previous night by a black person, and he admitted that he could no longer be fair to black persons. He was excused, and alternate No. 1 became juror No. 5. (Tr. 571-72). Moreover, after being selected, alternate No. 3 recalled a situation which, the juror decided, prejudiced him, and he was excused. (Tr. 499). In sum, the court conducted a *voir dire* which resulted in the selection of a panel whose background was fully explored, and whose state of mind with respect to the racial "question" was probed as well.⁵

⁵ The following is a list of those finally selected: Nos. 97 (#1), 49 (#2); 138 (#3); 63 (#4), 104 (#5) (originally alternate #1); 24 (#6); 110 (#7); 141 (#8); 42 (#9); 146 (#10); 132 (#11)

Although the court specifically disclaimed that any threats had been reported in this case (Tr. 291), there were instances, brought up during the *voir dire*, that indicated that some threats may have been made in the case.⁶ For instance, it was reported (Tr. 283) that the Marshal's office, which had the Government's witness Geronimo in protective custody, was called by an anonymous caller who allegedly said, about Geronimo: "If he does anything, he'll be dead". This threat was reported to the court.

During the *voir dire*, the court indicated its concern with the "irresponsibility" of the press. After the court's decision to sequester the jury was announced (and the decision to withhold names and addresses), the New York City afternoon paper came out with an article which suggested that there had been specific threats. The court acknowledged later that afternoon that there had been none (Tr. 370-72), suggesting that the press had irresponsibly attributed such a statement to him when, in fact, a statement about the possibility of threats had been made at some earlier proceeding by an Assistant United States Attorney.

Other problems in insulating the jurors occurred. For example, at one time defense counsel called to the court's attention the fact that there was a "psycho" sitting among the prospective jurors who had been talking to them about Barnes. The court's solution, short of excluding specta-

and 36 (#12). Of these jurors, five were black, one of the five alternates was Hispanic. The individual *voir dires* of the panel members reveal a representative sampling. See Tr. pp. 385-92 (#1); 394-99 (#2); 145-50 (#3); 241-45 (#4); 485-90 (#5); 315-24 (#6); 478-83 (#7); 343-49 (#8); 245-53 (#9); 457-63 (#10); 463-69 (#11); and 426-33 (#12).

⁶ See note 3 *supra*, detailing other Southern District cases in which intimidation had in fact occurred.

tors, was to have prospective jurors sit on one side of the room, and spectators on the other. (Tr. 373-75).

The court's attitude was expressed at the beginning of the *voir dire*:

"It is imperative in a case of this importance that nothing be allowed to occur which might interfere with this jury's impartial and objective study of the evidence and the application of the law.

"As a consequence, in the interest of protecting the privacy of the jurors and their families and saving them from the resultant embarrassment should any such incident occur [having just discussed media interviews], I have elected to maintain the anonymity of the jurors. This will insulate the jurors and their families from such possible inquiries on the one hand and on the other permit the media complete freedom of coverage of this trial." (Tr. 17).

Appellate judges, from the comparative security of their ivory towers, are not burdened, as was this trial judge (and, indeed, as are all trial judges), with the responsibility of providing for the protection of the jurors, witnesses, and counsel.⁷ It can be no answer that no untoward event had occurred up to the opening of the trial. The trial judge had to take such steps as might be necessary in advance to avoid such an event. Cases need not be cited to prove the adage of the futility of locking the barn door after the horse has escaped.

Appellants concede that "it is not asserted that the trial court's failure to disclose jurors' exact residence addresses,

⁷ Indeed, on the eve of trial, in September 1977, a potential witness, Shepard Franklin, was reportedly murdered at the Harlem River Motors Garage—the site of much of the trafficking in this case. (See Gov't Br. 106 n.*).

standing alone, warrants reversal". (J.Br. 12, n.*). They claim, however, that the judge's refusal to inquire into "ethnic" background "in lieu of their identities" deprived them of a fair trial. We disagree.

The Law

Questions as to the trial procedure to be adopted in any particular case must, of necessity, depend upon the issues raised in that specific case. A general principle of law thus has been developed that the trial judge has broad discretion in conducting the *voir dire*, e.g., *Aldridge v. United States*, 283 U.S. 308, 310 (1931); *United States v. Taylor*, 562 F.2d 1345, 1355 (2d Cir.) cert. denied, 432 U.S. 909, 434 U.S. 853 (1977); *United States v. Tramunti*, 513 F.2d 1087, 1114 (2d Cir.), cert. denied, 423 U.S. 832 (1975); *United States v. Delay*, 500 F.2d 1360, 1366 (8th Cir. 1974), as he does in his conduct of the trial generally.

What is required of a trial judge in his conduct of the *voir dire*, according to the Supreme Court cases, is that he permit at least some questioning with respect to any material issue that may arise, actually or potentially, in the trial. In *Aldridge v. United States*, 283 U.S. 308 (1931), the Supreme Court, exercising "supervisory powers" over the conviction of a Negro sentenced to death for killing a white policeman in the District of Columbia, held that it was error to deny completely all questioning of veniremen directed at eliciting racial prejudice. The standard set by the Court, which remains the standard today,⁸ is that

⁸ *Aldridge* was not founded on any federal constitutional underpinnings. However, the right of a state defendant to have questions asked concerning racial prejudice did assume constitutional proportions in *Ham v. South Carolina*, 409 U.S. 524 (1973), in which the Supreme Court held that a bearded black civil rights worker had been denied due process by the trial court's refusal to ask about racial prejudice. The Court found no constitutional error, however, in the

the trial court's discretion must be exercised consistent with "the essential demands of fairness", *id.* at 310, in the particular case. The *voir dire* was held unfair in *Aldridge* because the trial judge "failed to ask any question which could be deemed to cover the subject", *id.* at 311, in order to uncover a "disqualifying state of mind". *Id.* at 313.

Aldridge rested in part on the fact, brought to the trial court's attention, that counsel had heard that a juror on a previous trial of the case had expressed an attitude about the defendants' race and that of the victim. *Id.* at 310. The Supreme Court thought that this factor "invite[d] appropriate action by the court", *id.* at 311, so that a fair and impartial verdict would be assured. However, the Court cited an earlier case, *Connors v. United States*, 158 U.S. 408 (1895), as an example of a case "where the suggestion of bias was held to be too remote" to require a judge to

trial court's refusal to ask about prejudice against bearded persons, and limited its holding to the facts of the case.

In *Ristaino v. Ross*, 424 U.S. 589 (1976), the Supreme Court, limiting *Ham*, reversed the grant of a Writ of Habeas Corpus given to a black state prisoner convicted of robbing and assaulting a white security guard. The Writ had been awarded on the supposed authority of *Ham*, because the state trial judge had refused to ask veniremen about racial prejudice. The Supreme Court stated that "[t]he Constitution does not always entitle a defendant to have questions posed during *voir dire* specifically directed to matters that conceivably might prejudice veniremen against him". *Id.* at 594, citing *Ham*, *supra*, 409 U.S. at 527-28. The mere circumstances in *Ristaino* that the defendant was black and victim white was insufficient to require, as a matter of constitutional law, the asking of specific racial prejudice oriented questions, because the state's obligation to supply an impartial jury could be satisfied by less than an inquiry into specific prejudice feared by a defendant. The *Ristaino* Court stated that the matter of *voir dire* was properly within the trial judge's discretion because the "'determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge'". 424 U.S. at 594-95, quoting *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting).

It thus appears that the constitutional standard has coalesced with the *Aldridge* "fairness" standard.

conduct inquiry. 283 U.S. at 314 n.4. In *Connors*, a prosecution for interference with elections, the Court rejected the suggestion that the trial judge had abused his discretion in denying all questioning of potential jurors about political beliefs and affiliations because the potential for exposing a juror's bias against the defendant from such line of questioning was simply too remote.

Although the Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), recognized the importance of the peremptory challenge, and approved questioning of potential jurors to form the basis for such challenges, it did not change the basic rule that a trial judge's discretion will be upheld unless a defendant has been precluded from obtaining an impartial jury. Thus, as noted by the First Circuit in *Schlinsky v. United States*, 379 F.2d 735, 738 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967):

"[I]n our opinion the purpose of the *voir dire* is to ascertain disqualifications, not to afford individual analysis in depth to permit a party to choose a jury that fits into some mold that he believes appropriate for his case."⁹

And, as stated in *United States v. Robinson*, 475 F.2d 376, 380-81 (D.C. Cir. 1973),

"The defense must be given a full and fair opportunity to expose bias or prejudice on the part of the

⁹ In partial contrast, see *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973), in which the court approved broad (but not limitless) *voir dire*. The case involved convictions of demonstrators under the federal Anti-Riot Act arising out of the events at the Democratic National Convention in Chicago. Though the defendants accepted the jury "under the greatest of protest", they argued that the *voir dire* had been inadequate because it was too perfunctory to provide a basis for challenge and to permit selection of an impartial jury. The trial court had asked only some

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veniremen. . . . The possibility of prejudice is real, and there is consequent need for a searching *voir dire* examination, in situations where, for example, the case carries racial overtones, or involves other matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact. In a case involving such sentiment, the trial court must take it into account and govern the *voir dire* accordingly. Still other forms of bias and distorting influence have become evident, through experience with juries, and have come to be recognized as a proper subject for the *voir dire*. An example is the problem that jurors tend to attach disproportionate weight to the testimony of police officers. . . .

"When the matter sought to be explored on *voir dire* does not relate to one of those recognized classes, it is

of the potential jurors about prejudice resulting from employment by federal law enforcement agencies; also, the subject of "patriotism" was not covered; nor was inquiry made into the possibility of a conflict of values (and resulting prejudice) from the fact that the defendants wore long hair, beards, and "bizarre clothing" and that they might "seem to avoid the burdens and responsibilities of regular employment". 472 F.2d at 369.

The court rejected the prosecution's argument that *voir dire* may be limited to matters falling within challenges for cause, and reversed the conviction on the ground that insufficient inquiry had been made under the circumstances of the case. According to the court, the right to exercise peremptory challenges would be an "empty one" unless the defendants, on request, were "permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges". 472 F.2d at 368.

Although the *Dellinger* decision suggests that the judge's discretion in conducting *voir dire* should be broad, nonetheless reversal was mandated in the case because of the trial court's refusal to conduct inquiry into issues touching on the character of the defendants themselves—issues which, on such a politically-charged question as arose from the events at the Convention, would surely inject themselves into the deliberations.

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incumbent upon the proponent to lay a foundation for his question by showing that it is reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp. . . . Absent such a showing, [there is] no prejudice to the rights of the accused." (Footnotes and citations omitted).

Little purpose would be served by discussing in detail all the many cases in this area. They can be summed up by reference to the discretion standard, and analysis shows that, when questioning can be deemed fair—when a jury can be deemed free of bias—a trial judge's decision as to the conduct of the *voir dire* will be upheld. As long as there is some questioning as to identifiable issues connected in some way with persons, places, or things likely to arise during the trial, an appellate court faced with a cold record should be satisfied that justice has been done.

Illustrative of the cases in this area is *Yarborough v. United States*, 230 F.2d 56, 63 (4th Cir.), cert. denied, 351 U.S. 969 (1956), in which it was held that there was no error in declining to inquire into jurors' religious backgrounds and affiliations since no matter of religious significance was involved. The court noted that there was nothing to show that defendant belonged to any religious sect or was charged with a crime as to which any sect held particular views. Similarly, in *United States v. Daily*, 139 F.2d 7 (7th Cir. 1943), a prosecution for avoiding service in the armed services brought against a member of the Jehovah's Witness sect, the trial court had permitted limited inquiry into whether any of the potential jurors entertained a prejudice against members of that minority sect, but refused to ask about their knowledge of matters of the sect's ministry. The Seventh Circuit agreed with the trial court's

decision; though religious faith was not directly in issue, still the defendant's religion would be brought to light in the case.

There are numerous cases in which a trial court's decision to limit *voir dire* has been sustained because the matter sought to be probed by the defendant was too remote from the issues in the case to warrant the intrusion into the potential jurors' private thoughts. See, e.g., *United States v. Taylor*, 562 F.2d 1345, 1355 (2d Cir.), cert. denied, 432 U.S. 909, 434 U.S. 853 (1977) (no error to deny inquiry into prospective jurors' educational backgrounds and into question whether they had children since questioning was fair to permit intelligent challenges); *United States v. Hamling*, 481 F.2d 307, 314 (9th Cir. 1973), aff'd, 418 U.S. 87, 138-40 (1974) (refusal to ask about views toward sex and obscenity was proper in obscenity prosecution); *United States v. Workman*, 454 F.2d 1124, 1128 (9th Cir.), cert. denied, 409 U.S. 857 (1972) (upholding refusal to ask about attitudes toward drug use, political activists, and antiwar demonstrators in prosecution of antiwar demonstrator for assault on policeman and destruction of government property); *Maguire v. United States*, 358 F.2d 442, 444-45 (10th Cir.), cert. dismissed, 385 U.S. 801, cert. denied, 385 U.S. 870 (1966) (upholding refusal to inquire about bias against homosexuals when the defense to charge of auto theft was that car owner had given car to defendants after they had threatened to divulge his homosexuality); *Wagner v. United States*, 264 F.2d 524, 527 (9th Cir.), cert. denied, 360 U.S. 936 (1959) (rejecting argument that specific addresses of jurors were necessary to determine "whether there is any proximity to any possible witnesses or information"; "approximate community" was sufficient). Certainly, in all these cases, the information sought would

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have been helpful to the defense in the sense that Clarence Darrow envisioned that every bit of information might be helpful. However, because no issue was raised requiring inquiry into the matters as to which requests had been made, the courts made the determinations that inquiry must be reasonably limited. It is not, after all, the prospective jurors who are on trial in the cases that come before the courts. It can be imagined that, as counsel seek more and more information to aid in filling the jury box with persons of a particular type whom they believe to be well disposed toward their clients, prospective jurors will be less than willing to serve if they know that inquiry into their essentially private concerns will be pressed. See *Yarborough v. United States*, *supra*, 230 F.2d at 63 (religion is "private matter"; no reason to inquire); cf. *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1142 (2d Cir. 1978) (jury provided with special entrance to courtroom "to secure their privacy and protection"). As long as a defendant's substantial rights are protected by a *voir dire* designed to uncover bias as to issues in the cases and as to the defendant himself, then reasonable limitations on the questioning should not be disturbed on appeal.

Appellants have not advanced any reason that would support the disclosure of the ethnic backgrounds of their trial jurors. There is nothing to indicate that persons of one ethnic type or another are more favorably disposed toward narcotic trafficking or to using firearms. Whatever prejudice may be shared by members of any ethnic group as to black persons would have been uncovered by the questioning about attitudes toward blacks. Thus, it can hardly be said that defendants' right to a fair trial was violated by the limitation on the *voir dire* imposed by the trial judge in this case.

As to the court's decision to withhold names and addresses of the jurors, appellants take the position that "jurors must publicly disclose their identities and publicly take responsibility for the decisions they are to make . . .". (J.Br. 28). This, however, is not the law—and should not be if a juror feels that he and his family may be subjected to violence or death at the hands of a defendant or his friends, how can his judgment be as free and impartial as the Constitution requires? If "the anonymous juror feels less pressure" as the result of anonymity (J.Br. 28), this is as it should be—a factor contributing to his impartiality. The court's decision as to anonymity and sequestration comported with its obligation to protect the jury, to assure its privacy, and to avoid all possible mental blocks against impartiality.

As noted above, see note 3, *supra*, the history of violence in this district is well known. There was much pretrial publicity playing up the alleged acts of violence on the part of the actors in the case. It would be nothing short of irresponsible were a trial judge sitting in New York City to close his eyes to these circumstances.

In fact, some fifteen years ago, this court anticipated the problem now before us in another case involving a narcotics conspiracy. In a decision written by Judge Friendly, in which Judge Smith and now-Justice Marshall concurred, the court stated that the events in that case, involving threats to jurors in the form of unsigned letters,

"demonstrat[ed] the need for precautions assuring that the addresses, and perhaps even the names, of jurors in cases such as this will be held in confidence; courts must protect the integrity of criminal trials against this kind of disruption, whether it emanated from defendants' enemies, from their friends, or from neither."

United States v. Borelli, 336 F.2d 376, 392 (2d Cir. 1964), cert. denied sub nom. *Cinquegrano v. United States*, 379 U.S. 960 (1965). It seems that the time has come to approve the precautions suggested in *Borelli*. It will not do to say that, because there were no actual threats received in the case at bar, Judge Werker's action was inappropriate, for the circumstances were such that the suggestion of disruption was manifest. That is not to say that the courts should sanction the approach taken by this trial judge in every case. However, in a case that generated as much pretrial publicity as this one did and in which allegations of dangerous and unscrupulous conduct abounded, precaution was best taken so that fears would not become realities.

If the giving of names and addresses had been required so that investigation could have been made in the neighborhood or from their families as to their characteristics, any semblance of an impartial jury would have been destroyed. Fear of retaliation against themselves or members of their families would inevitably have been uppermost in their minds during their deliberations. Sequestration would have been no protection in the event of a guilty verdict. And since communication with their families during sequestration would have been permitted, a mere threat to the family of one juror would have permeated the entire jury.

As to religion, our jury selection system was not designed to subject prospective jurors to a catechism of their tenets of faith, whether it be Catholic, Jewish, Protestant, or Mohammedan, or to force them to publicly declare themselves to be atheists. Indeed, many a juror might have a real doubt as to the particular religious category into which they could properly place themselves. The same can be said of ethnic background.

The courts have recognized the increasing peril in other contexts. For example, in *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2d Cir.), cert. denied, 423 U.S. 937 (1975), a case dealing with the propriety of closing the courtroom to spectators while two undercover narcotics agents testified, Judge Lumbard, concurring, took note of the increasing perils associated with narcotics investigations and prosecutions. He said:

"Any judge of a court which is concerned with the prosecution of offenses against the narcotics laws knows all too well the great dangers and difficulties which face law enforcement officers . . . In no area of law enforcement have murder, mayhem and terror been more frequently used against disclosure and testimony. Against this background of judicial knowledge and notice, the undisputed assertion of the district attorney [relating to the dangers posed to the two agents] was sufficient reason for the county judge's action in closing the court to spectators during their testimony." 520 F.2d at 1275.

Unfortunately, the situation which prompted the trial judge's actions in *Lloyd* was not uncommon. The courts must recognize the danger, and permit the trial judge appropriate leeway to assure that the trial he is to conduct will be conducted fairly and impartially, with a minimum of intrusion into the lives of the prospective jurors.

Appellants' characterization of the procedure followed in this case as a "blind-man's bluff"—as constituting a deprivation of their right to meaningfully probe the jurors' potential biases—is overstated. A criminal defendant is entitled, under the law, to a fair and impartial jury. To be sure, there must be sufficient information elicited on

voir dire to permit a defendant to intelligently exercise not only his challenges for cause, but also his peremptory challenges, the right to which has been specifically acknowledged by the Supreme Court despite the lack of a constitutional statutory source. *Swain v. Alabama*, 380 U.S. 202 (1965). To say, however, that the limitations imposed in this case constituted a denial of the right to an intelligent exercise of the challenge is to underestimate the ability of counsel to gain the same, or substantially the same, insights into the prospective juror's thoughts by observing his demeanor, generally, and by listening to the answers to questions concerning family, education, and other matters (which were covered rather extensively in this case), as one might gain by being informed of a person's residence address or ethnic background. One's style of clothes, for example, and one's manner of speaking, certainly reveal much about a person's character. Indeed, it is unlikely that the disclosure of any bit of information will contribute to an impression of the person that differs materially from the impression gained by appearances and answers to questions bearing on the case, such as the questions concerning attitudes toward blacks that were asked here.

What we are confronted with, then, is a *voir dire* procedure under which both the prosecutor and defense were equally in the dark as to names and addresses of the prospective panelists, and where neither side was told the exact ethnic background or religion of those persons. Both sides, however, had an arsenal of information about each person that was based on his responses to questions concerning his own life, as well as his attitudes about the issues that would arise in the case. This can hardly be deemed "inadequate". The law as to jury selection¹⁰ is not so

10 The literature (i.e., the articles) in this field has been amply cited by the appellants to support their theory that any limitation on the

unbending that it cannot, or should not, be accommodated to the realities of modern day trials in large narcotics cases which have created such problems for the courts in large cities. Clarence Darrow's ideal has already yielded

voir dire is improper. E.g., ABA Standards Relating to Trial by Jury §2.2 (Approved Draft 1968); Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 Stan. L.Rev. 545 (1975); Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 Brooklyn L.Rev. 290 (1972); Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L.Rev. 491 (1978); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan. L.Rev. 1493 (1975); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715 (1977). A review of these articles—and many, many more—leaves the impression that the resolution of the issue before us depends not on any interpretation of law, but rather requires a judgment as to the proper accommodation between the need to protect jurors, the goal of promoting efficiency in the conduct of criminal trials without doing damage to the right of a criminal defendant to an unbiased and impartial jury, and the desire of the defendant to know as much as possible about those who sit in judgment on him. The literature does little to resolve the question; rather, depending on the slant of the author, each article offers a point of view on the best methods of conducting *voir dire*. The slant of the articles cited by appellants, of course, is that the attorney should be able to ask what he will and to take full control of the jury selection process. Be that as it may, there are also many articles relating the abuses of attorney-controlled *voir dire*, which suggest that a reasonable inquiry into the essentials raised in the particular case should be sufficient, and that the trial judge should retain the discretion to apply limits. E.g., Braswell, *Voir Dire—Use and Abuse*, 7 Wake Forest L.Rev. 49 (1970); Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S.Cal.L.Rev. 916 (1971) (federal method, i.e., questioning controlled by judge, produces time savings without excessive abuse, and is preferred to other methods); Note, *Judge Conducted Voir Dire As A Time-Saving Trial Technique*, 2 Rutgers-Camden L.J. 161 (1970); Martin, *Lawyers Speak The Truth About Counsel-Conducted Voir Dire* (American Judicature Soc'y, 1970); Okun, *Investigation of Jurors by Counsel: Its Impact On The Decisional Process*, 56 Geo.L.J. 839 (1968) (background investigation of jurors may intimidate jury decision-making). See also Title, *Voir Dire Examination of Jurors in Criminal Cases*, 43 Calif. State Bar. J. 70 (1968) (describing California system, which limits *voir dire* to subjects about which there could be challenge for cause); Kallen, *Peremptory Challenges Based On A Juror's Background: A Rational Use?*, 13 Trial Lawyer's

to what has been thought to be the greater necessity, i.e., the need to streamline the *voir dire* process by resting the control of it in the district judge, see Fed. R. Crim. P. 24(a), subject to the demand that the essentials of the case should be the subject of inquiry. If that demand is satisfied, then so will have been the rights of the parties.

In sum, the trial transcript here reveals that the trial court followed the *voir dire* precepts held by the decisions to be essential. The suggestions made by appellants as to fields into which they would roam would, if we were blindly to accept them, lead to *ad absurdum* ends. If Darrowesque questioning of prospective jurors were allowed, namely "religion, politics, social standing, family ties, friends, habits of life and thought", any semblance of juror privacy would have to be sacrificed. There is neither statutory nor constitutional law that requires disclosure of information about jurors unrelated to any issue as to which prejudices may prevent an impartial verdict.¹¹ Nor has any case been brought to our attention that casts any doubt on the procedure followed by the trial judge in this case. Since the court gave counsel full opportunity for an intelligent exercise of challenges by inquiring into the essentials of the case at hand, appellants were not deprived of any trial right which would require a new trial.¹²

Guide 143 (1965) (little agreement between experienced trial lawyers about characteristics making jurors desirable); Plutchik & Schwartz, *Jury Selection: Folklore Or Science?*, 1 Crim.L.Bull. 3 (May 1965) (psychologists think that lawyers' "rules" for picking juries do not yield scientific results).

11 In capital cases, there is a statute that requires the disclosure of names and addresses of prospective jurors three days prior to trial. 18 U.S.C. §3432. The statute is inapplicable to non-capital cases.

12 Indeed, it might even be pointed out that the jury was selective in its decisions, acquitting two of the defendants entirely, acquitting defendant Barnes on three of the substantive counts, and failing to

II.

Appellants place great stress on an incident which occurred after some six weeks of trial and at the end of a court day. Four defense lawyers were walking along a public sidewalk on a street adjacent to the courthouse when they passed the bus in which the jurors were sitting. Counsel for the defendant Guy Fisher claimed that one of the jurors directing his eyes at him, raised his middle finger in a sign generally recognized to be the antithesis of approval and indicated by an expression on his face "distaste for me [the counsel]". (J.Br. 32). At the time, three other defense lawyers were with Fisher's counsel. The incident was brought to the court's attention that evening. Counsel for Fisher requested that the particular juror be dismissed and that an alternate juror be substituted. The following morning, the court declined to dismiss the juror or to conduct a *voir dire* on the subject, which would have involved the juror in question and possibly other panel members. The court felt that a cautionary instruction would be the wisest course to follow, but permitted counsel to put the facts, as he viewed them, on the record. After hearing full argument, the court stated, in substance, that an examination into the subject, namely, a *voir dire*, would involve not only all four defense counsel present at the time of the incident, but also possibly the other jurors, and that such an examination "in my [his] opinion would be extremely prejudicial, especially in view of the fact that in all probability

reach a verdict as to defendant Guy Fisher, while voting to convict as to the remaining charges and defendants. This is perhaps some indication that impartial debate was undertaken, the jury deciding the case on the evidence as it was shown to do. *Accord, United States v. Haldeman*, 559 F.2d 31, 60 n.28 (D.C. Cir. 1976) (en banc) (per curiam), cert. denied, 431 U.S. 933 (1977).

the juror is going to say no, I didn't do it, and, as a result of that, there will be resentment which will be engendered throughout the jury against the four of you". (Tr. 5896). The court believed that "no matter what I tell them . . . there is bound to be some passing back and forth of communication". (Tr. 5896-97).

Not waiting for the final charge, the court told the jury, without reference to any juror, counsel, or the incident itself, that their personal feelings should not "be reflected for or against any of the defendants or government attorneys". (JA 592).

Appellate courts have given, and should give, broad discretion to trial judges to pass upon charges of juror misconduct or disqualifying prejudice made visible in a tangible way. Other cases presented under other circumstances in other courtrooms may provide guidelines, but each case is actually *sui generis*. See, e.g., *United States v. Bufalino*, 576 F.2d 446, 451-52 (2d Cir. 1978), cert. denied, 99 S.Ct. 314 (1978); *United States v. Hockridge*, cert. denied *sub nom. Easton v. United States*, 99 S.Ct. 85 (1978), 573 F.2d 752, 756 (2d Cir. 1978); *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977).

In *Panebianco*, for example, defense counsel complained that, during cross-examination of a Government witness, one juror had commented "Why doesn't he stop wasting my time with these questions?" and "Well, he's already answered that question"; a second juror had purportedly said "He's got some nerve asking these questions". 543 F.2d at 457. Although the attorneys had asked the trial judge to question the two jurors to ascertain bias, this court upheld the trial court's decision to simply reiterate an instruction not to discuss the case or to form any opinion. Writing for this court, Judge Lumbard stated that

"the jurors were only exhibiting impatience That jurors react naturally does not mean they are biased. By reiterating his cautionary instruction to the jury, [the trial judge] did all that was necessary. Under the circumstances this was probably a wiser course than a *voir dire* and was clearly not an abuse of discretion". *Id.*

Even in the cases where other procedures have been taken by a trial judge faced with allegations of juror bias during the trial and approved by this court, the approval has been based on the reality that the trial judge observing the jury on a day to day basis (and in the case before us, on a week to week basis), is in the best position to sense the atmosphere of the courtroom as no appellate court can on a printed record. Any incident, such as the one that allegedly occurred in this case, puts court and counsel on the alert to observe the jurors even more intently during the remaining time, which, in this case, was another four weeks. In those four weeks, no other incident was noted or reported.

Fortunately, appellate courts are shielded from knowledge of the deliberations in the jury room. We are not so unworldly, however, as not to know that there are skilled counsel who profess to be able to fortell a juror's reactions. We, in turn, can only look at the facts objectively. We know that there was no verdict of guilty against Guy Fisher, whose counsel was allegedly the target of the juror's distasteful gesture, but rather a "hung jury" as to that defendant. We cannot, therefore, verify the prophecy of Fisher's counsel that "This man [the juror in question] is certainly not going to vote not guilty in this case". (Tr. 5892). There is thus no basis for any conclusion that the juror was faithless to his jury commitment. We do know, also, that two defendants were acquitted, that Barnes himself was acquitted on the FOURTH, FIFTH and ELEVENTH Counts, and

that McCoy was acquitted on two firearms counts (NINTH and TENTH). Any fear that the allegedly prejudiced juror could have led the jury to a verdict of guilty is belied by the result.

Under the circumstances, the court exercised its discretion wisely. A *voir dire* might well have brought forth appeals on the ground that such an occurrence as happened here was prejudicial to all defendants. The trial judge's conduct of the matter was entirely appropriate.

III.

On the trial, the Government introduced into evidence the income tax returns obtained from the Internal Revenue Service (IRS) of defendants Barnes, Hayden, Guy Fisher, Hines, and Wayne Sasso. All appellants now attack the refusal of the trial court to hold a hearing so that they might inquire as to the papers on which, and the manner by which, the Government obtained these returns. As to the returns themselves, appellants assert that their prejudicial effect outweighed their relevance to the issues and also violated appellants' privilege against self-incrimination.

Obtaining the Returns

Appellants argue that they were entitled to have the information upon which the court issued its order and to a hearing on their motion to obtain it. 26 U.S.C. §6103(i)(1),¹³ a part of the Tax Reform Act of 1976, provides for dis-

¹³ 26 U.S.C. §6103(i)(1) reads as follows:

(i) Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration.—

(1) Nontax criminal investigation.—

(A) Information from taxpayer.—A return or taxpayer return information shall, pursuant to, and upon the grant of, an

closure of tax returns and return information to federal officers for non-tax-related criminal investigation purposes, upon an *ex parte* order by a federal district court judge,

ex parte order by a Federal district court judge as provided by this paragraph, be open, but only to the extent necessary as provided in such order, to officers and employees of a Federal agency personally and directly engaged in and solely for their use in, preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party.

(B) Application for order.—The head of any Federal agency described in subparagraph (A) or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, may authorize an application to a Federal district court judge for the order referred to in subparagraph (A). Upon such application, such judge may grant such order if he determines on the basis of the facts submitted by the applicant that—

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;

(ii) there is reason to believe that such return or return information is probative evidence of a matter in issue related to the commission of such criminal act; and

(iii) the information sought to be disclosed cannot reasonably be obtained from any other source, unless it is determined that, notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the most probative evidence of a matter in issue relating to the commission of such criminal act.

However, the Secretary shall not disclose any return or return information under this paragraph if he determines and certifies to the court that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

Further, subsection (4) of the same section provides for use of tax return information in judicial proceedings. It reads:

(4) Use in judicial or administrative proceeding.—Any return or return information obtained under paragraph (1), (2), or (3) may be entered into evidence in any administrative or judicial proceeding pertaining to enforcement of a specifically designated Federal crim-

when authorized by the Attorney General, the Deputy, or an Assistant. The judge determines "on the basis of the facts submitted by the applicant" whether (1) a specific criminal act has been committed; (2) the return (or return information) is probative; and (3) the return is the most probative evidence of the alleged criminal act. If these questions are answered in the affirmative, the tax information may be entered into evidence in a criminal proceeding under 26 U.S.C. §6103(i)(4).

There is nothing in the statute providing for notice to the taxpayer, a hearing on the application, or disclosure of the information on which the judge acted. In short, the procedure specified is *ex parte*.

Appellants, relying on *United States v. Mangan*, 575 F.2d 32 (2d Cir. 1978) would have the statute construed otherwise, and would analogize the disclosure order to search warrants and wire-tap orders. In *Mangan*, Judge Friendly, discussing the statute in a different context, did refer to the procedure for obtaining returns as a "type of search warrant procedure". *Id.* at 38. However, Congress, in broadening the taxpayers' protections by enacting the Tax Reform Act of 1976, of which 26 U.S.C. §6103(i) is a small

inal statute (not involving tax administration) to which the United States or an agency described in paragraph (1)(A) is a party but, in the case of any return or return information obtained under paragraph (1), only if the court finds that such return or return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party. However, any return or return information obtained under paragraph (1), (2), or (3) shall not be admitted into evidence in such proceeding if the Secretary determines and notifies the Attorney General or his delegate or the head of such agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation. The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding.

part, had before it the search warrant and wire-tap procedures, which differ from the procedure specified in the new statute. The legislators were apparently content to rely on a judge's competence to pass upon the facts submitted and the need for disclosure in a given case. Although the *Mangan* case refers to a "suppression motion" in connection with the use of tax returns, such a reference to an issue that was not specifically before that panel (*i.e.*, whether a defendant may test the use of tax returns by means of a motion to suppress) is not determinative. Nor is it determinative that in *Mangan*, Judge Friendly cited a wire-tap case, *Giordano v. United States*, 416 U.S. 505 (1974), to support a conclusion that an application for disclosure of tax returns *must* be authorized by one of the officials named in the statute, for although it is true that there is some degree of similarity between the procedures involved in obtaining disclosure of tax returns and wire-tap orders of search warrants, the procedures are governed by different statutes. Unlike the wire-tap and search warrant provisions, *see* 18 U.S.C. §§2518(9), (10) (wire-tap) and Fed. R. Crim. P. 41 (f) (search warrant), there is nothing in the Tax Reform Act indicative of congressional intent to subject a judge to examination by defense counsel as to the facts on which he based an order to disclose tax returns, or his rationale therefor. The courts should be loath to imply an exclusionary sanction in this context, especially since none appears in the Tax Reform Act itself and since civil and criminal penalties have been expressly provided. 26 U.S.C. §§7213(a) (criminal penalties), 7217 (civil remedies in favor of taxpayer).

Relevance of the Returns

Evidence of the possession and receipt of huge amounts of money is highly relevant in an operation in which the

costs of the commodity and the profits therefrom are astronomical. According to the evidence at trial, the various defendants in the conspiracy, during the period thereof, owned and/or operated (through "leasing" companies, one of which operated out of the Harlem River Motors Garage, one of the focal points of the conspirators' activities) a variety of cars, including Mercedes Benz, Cadillacs, Corvettes, a Citroen Maserati (Barnes), a Jaguar (Baker), and a host of other cars. As part of its proof, the Government introduced the tax returns of defendants Barnes, Hayden, Guy Fisher, Hines, and Wayne Sasso (Sasso was acquitted), which showed reported "miscellaneous" income totalling collectively over \$1,380,000 for the years 1974-76. Barnes and the other four all used the same tax attorneys' firm in Detroit, Michigan, a city quite distant from the alleged sites of the defendants' operations. The Government also showed that defendant Monsanto filed no federal tax returns during the alleged conspiracy, and that Hatcher reported only moderate amounts of income, despite the fact that Monsanto was the driver of at least 17 leased cars during the period, and Hatcher was the driver of 13, including a Mercedes Benz. (Hatcher was also shown to have purchased a Mercedes from a New Jersey doctor in 1976, for the sum of \$16,500, paid in ten- and twenty-dollar bills.)

The mere fact that the defendants listed large amounts under the headings of "miscellaneous" and "other" income was, in and of itself, a warning signal that the money came from a source which the recipient preferred not to disclose. A legitimate source, as the Government argues, could easily have been identified and stated.

It has long been the rule that

"where a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the

sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced". *United States v. Jackskion*, 102 F.2d 683, 684 (2d Cir.), cert. denied, 307 U.S. 635 (1939).

See also United States v. Hinton, 543 F.2d 1002, 1012-13 (2d Cir.), cert. denied sub nom. *Carter v. United States*, 429 U.S. 980 (1976) (in narcotics prosecution, proper to introduce evidence of large expenditures of cash, as well as evidence of failure to file returns); *United States v. Magnano*, 543 F.2d 431, 437 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977) (evidence of defendant's possession of huge sums of cash admissible to show, *inter alia*, "means" for narcotics trafficking); *United States v. Tramunti*, 513 F.2d 1087, 1105 (2d Cir.), cert. denied, 423 U.S. 832 (1975) (same); *United States v. Falley*, 489 F.2d 33, 38-40 (2d Cir. 1973) (proper to show defendants' substantial expenditures for travel costs and tax returns suggesting no legitimate source). The rule is no less applicable in this case; that the Government showed receipt of large amounts of money by the defendants' own declarations that they had received it as income makes the evidence no less relevant. Not only was it probative of the conspiracy and substantive counts, but, as to Barnes, it was offered to show an element of the offense of conducting a "continuing criminal enterprise", 21 U.S.C. §848, i.e., that the defendant obtained "substantial income or resources" from the enterprise. 21 U.S.C. §848(b)(2)(B).

As the Government argues, the returns were also relevant in this case to establish the existence of the conspiracy and its membership. The defendants' returns were all prepared by one law firm in Detroit, Michigan. Hayden's return for 1976 showed a marked increase in miscellaneous income over his 1975 income, which corresponded with the

Government's theory that Hayden was "promoted" to the Number 2 spot in the "Barnes conspiracy" in 1976 after Guy Fisher, the previous Number 2 man, was jailed. Indeed, Guy Fisher's return for 1976 shows a marked decrease over that same period.

If there was any prejudice stemming from the Government's use of the tax returns, it was of defendants' own making.

Self Incrimination

Defendants argue that, though they did not assert their Fifth Amendment privilege on the returns themselves, they should have been permitted to assert it when the Government sought to use the returns at trial. The short answer to this contention is *Garner v. United States*, 424 U.S. 648 (1976), in which the Court held that disclosures made on tax returns were not "compelled incriminations". Had defendants wished to claim the privilege, they should have done so on the return itself.

It will not do to argue that, since a refusal to disclose income has been held to render a return "no return at all", *United States v. Jordan*, 508 F.2d 750 (7th Cir.), cert. denied, 423 U.S. 842 (1975), appellants could have been prosecuted under 26 U.S.C. §7203 for filing "no return" had they invoked their privilege instead of making their disclosure. The prosecution in *Jordan* was undertaken against a taxpayer whose attempted assertion of the privilege was deemed invalid insofar as the defendant gave no information other than his name, address, and social security number, purporting to make a "blanket fifth amendment declaration" as to the remaining questions, even the innocuous ones. However, as is made clear in *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927), the right to make a valid claim of privilege is available even as to

amount of a taxpayer's income, as well as any other item on the return which could legitimately cause self-incrimination. If, as appellants argue, cases "such as *Jordan*" are undercutting the *Sullivan* Court's guarantees against convictions for willful failure to file a tax return, 26 U.S.C. §7203, in cases where a valid claim of privilege has been asserted, then the proper remedy is to appeal from those convictions pursuant to *Sullivan*, not to change the rule enunciated in *Garner*. Since appellants did not claim the privilege on their returns, their Fifth Amendment rights were not violated at trial.

Appellants also claim error with respect to a portion of the prosecutor's summation, in which he discussed the large sums of cash taken from various defendants and reported on the tax returns. They argue that the prosecutor's challenges to the defense attorneys to explain the sources of the income constituted impermissible comment on defendants' failure to testify, in violation of their privilege to refrain from so testifying.

In *United States v. Bubar*, 567 F.2d 192, 199 (2d Cir.), cert. denied, 434 U.S. 872 (1977), a case in which the prosecutor commented upon the defendants' failure to explain Government evidence, the court held that

"the substance of the prosecutor's comments [did not] violate appellant's constitutional rights. The prosecutor is entitled to comment on a defendant's failure to call witnesses to contradict the factual character of the government's case, *United States v. Dioguardi*, 492 F.2d 70, 81-82 (2 Cir.), cert. denied, 419 U.S. 873 (1974), as well as his failure to support his own factual theories with witnesses. *United States v. Rodriguez*, 556 F.2d 638, 641 (2 Cir. 1977); *United States v. Lipton*, 467 F.2d 1161, 1168 (2 Cir. 1972), cert. denied,

410 U.S. 927 (1973). A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify. *United States ex rel. Leak v. Follette*, 418 F.2d 1266 (2 Cir. 1969), cert. denied, 397 U.S. 1050 (1970)."

As in *Bubar*, so in *Barnes*, the prosecutor was not suggesting the absence of contradicting evidence that only the defendants could supply. Certainly, there were witnesses other than defendants who could have testified about non-narcotics-related sources of cash and "miscellaneous" income. Appellants' assumption that they were the only persons who could explain the source is contrary to a realistic view of the situation. No jury could possibly think that no independent witnesses to the receipt of income existed.

We therefore conclude that the returns were properly obtained and received into evidence, that appellants were not deprived of their rights against self-incrimination, and that the prosecutor's summation was within the bounds of propriety.

IV.

Appellants argue reversible error in the trial court's refusal to accept proof which they claim would have established multiple conspiracies operating out of the Harlem River Motors Garage, namely a conspiracy, separate from the Barnes conspiracy, operated by one Robert Stepeney, not a defendant. By an offer of proof "they wished to prove: that there was an alternative source of drugs at the garage and therefore a separate and distinct conspiracy from the one charged in the indictment". (McCoy Br. 19).

In other words "if they were members of any conspiracy at all, it was not one involving Nicky Barnes, but, rather, one headed by Robert Stepeney and possibly involving Shepard Franklin". (Joint Reply Br. 39).

The proffered proof would have consisted of calling Sam Bellovin, an accountant for Harlem River Motors Garage who would have testified that he had delivered to IRS agent Kukis certain "Stepeney papers" which had come from a Harlem River Motors Garage safe; Kukis, in turn, would have testified that he had discovered among Stepeney's papers a quantity of heroin; and Martorell, a chemist, that the heroin was 23 percent pure—an unusually high percentage.¹⁴ Appellants claim that Stepeney himself had been observed at the Harlem River Motor Garage at least five times on the night of February 25, 1977, the date on which an alleged "transaction" took place.

Appellants also argue that the proffered proof would have affected the credibility of Wallace Fisher who had told Geronimo that Barnes oversaw all transactions at the Harlem River Motors Garage, presumably on the theory that Stepeney, too, played a similar role.

If the proffered evidence is viewed in the light most favorable to the defendants, the most that could have been proved was that Stepeney was a heroin dealer who worked out of the Harlem River Motors Garage. The defense did not offer any proof that Stepeney was the manager of an organization or was Barnes' partner, boss, or anything else. The Stepeney-Franklin operation was irrelevant to the existence of a Barnes conspiracy because it

¹⁴ Defense counsel never actually offered to call Bellovin, according to the Government. (Gov't Br. 106 n.*). Bellovin was the only witness who could have linked the "Stepeney papers" to Stepeney or Franklin; it is thus doubtful that the testimony of Kukis or Martorell, both of whom lacked personal knowledge, was at all competent on the issues urged by defendants to be relevant.

would merely have shown the existence of another division of the Barnes conspiracy, or at most, a parallel conspiracy which operated out of the Harlem River Motors Garage. Since there was sufficient evidence connecting all the defendants to the Barnes conspiracy, the trial court, which had the benefit of approximately six weeks of trial, was justified in excluding the irrelevant evidence of Stepeney's possible heroin activities.

V.

All defendants place great emphasis on a claim that the Government failed to disclose material in its possession as required by the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963) and under 18 U.S.C. §3500. The issue involved a difference in the testimony of Geronimo and DEA Agents as to the activities of Geronimo and Fisher on the evening of November 29, 1976, between the hours of approximately 5:00 P.M. and 9:00 P.M. Geronimo had testified to an extensive trip with Fisher in Fisher's car to various bars and a poolroom in upper Manhattan. Upon their return to Fisher's garage, Geronimo is purported to have told Agent Diaz that they had discovered the source of the narcotics about to be sold that evening by Rollock to Diaz, namely, it was coming from "Jazz"—a nickname for Hayden, who in turn worked for Barnes—and was "blessed" by "Nicky". (Tr. 2054-55, 4243).

This account, defendants contend, was completely false as shown by a surveillance report of Agent Shea (GX. 3511B for identification) used by Agent Lawler to refresh his recollection as to the events of November 29th. Out of the wide discrepancies¹⁵ defendants make two contentions: (1) the Government should have advised them of the exist-

¹⁵ Some of the discrepancies are set forth in note 16, *infra*.

ence of Exh. 3511B in advance of the Geronimo testimony so that it might have been used on cross-examination, and (2) that the Government knew or should have known that Geronimo's testimony was perjured. From this situation defendants drew the conclusion that it "was a deliberate eliciting of false testimony from a key witness concerning a material issue at trial". (McCoy Br. 42). It should be noted that Lawler and Special Agent Thomas Rooney conducted the surveillance of Geronimo. Their observations were consolidated in a report by Agent Shea. Lawler was called to testify by defendant Barnes.

Every inconsistency in witnesses' testimony does not mean that one witness is guilty of perjury—the other not. These are questions for jury resolution. The important appellate question is: was material which might have affected the jury's verdict improperly withheld from the defendant? In this case, we think not.

First, we agree with the Government that the "inconsistencies" between Geronimo's testimony and the report were not so great as to be completely contradictory. Lawler's and Rooney's surveillance covered only one of the three hours during which Fisher and Geronimo had been together.

Second, even if inconsistent, at the end of the day on which Geronimo completed his testimony, the exhibit in question (Exh. 3511 B *id.*), together along with other §3500 material was given to defendants. At this point they had two choices, either to recall Geronimo for further cross-examination or to call the Agents who had conducted the surveillance or both. They chose to call agent Lawler, whose testimony contradicted that of Geronimo, and was consistent with his earlier surveillance report. The fact that defendants' counsel now think that they could have made better use of the material on Geronimo's cross-exami-

nation cannot justifiably impute to the prosecution the elicitation of perjured testimony from Geronimo or the willful suppression of §3500 material. Furthermore defense counsel took full advantage of the difference in the testimony in their attacks on Geronimo's credibility in their summations. We thus find that appellants were not deprived of *Brady* material.

VI.

Appellants argue that it was error to receive in evidence on the Government's direct examination, written agreements between the Government and certain witnesses stating the understandings between the parties as to benefits to be bestowed by the Government on the witnesses in return for their truthful cooperation. Appellants' claim is that such agreements are tantamount to improper vouching by the Government for the credibility of the witnesses.

The practice of reducing such agreements to writing has grown out of situations which have frequently arisen in which there have been disputes as to the terms of oral understandings on the subject. The writing presents the opportunity for both parties to know the exact nature of their commitments.

While this court has repeatedly upheld the use of co-operation agreements in the face of claims of "improper vouching" by the Government for its witnesses, *United States v. Ricco*, 549 F.2d 264, 274 (2d Cir.), cert. denied, 431 U.S. 905 (1977); *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir.), cert. denied, 429 U.S. 983 (1976); *United States v. Alois*, 511 F.2d 585, 597-98 (2d Cir.), cert. denied, 423 U.S. 1015 (1975); *United States v. Koss*, 506 F.2d 1103, 1112-13 (2d Cir. 1974), cert. denied, 421 U.S. 911 (1975), the decisions in these cases were made with respect

to cooperation agreements introduced by the Government on redirect examination of witnesses whose credibility had been attacked on cross-examination. In the case at bar, appellants made timely objections to the use of agreements made by the two main prosecution witnesses, informers Robert Geronimo and Promise Bruce, when they were offered during the direct testimony of these two witnesses.

After the time of the trial in this case, the court decided *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir. 1978), which involved the same point appellants raise here. In *Arroyo-Angulo*, this court recognized that, although the use of a cooperation agreement cuts both ways insofar as it suggests not only a promise to testify truthfully, but also a motive to testify as the Government wished (regardless of where the truth may lie), the agreement, when introduced by the Government, is used primarily to bolster the credibility of a witness.

Thus, the *Arroyo-Angulo* court decided that, under established rules of evidence, the Government should not be permitted to introduce an agreement into evidence on direct examination. In *Arroyo-Angulo*, however, the error in admitting the agreement on direct examination was found not to be reversible since the objection to its use had not specifically concerned itself with the timing of its admission, and since cross-examination had been vigorous and thorough. The agreement would thus have been admissible at a later stage since "the cooperation agreement was a matter which the jury could properly consider in relation to the witness' credibility". 580 F.2d at 1147.

In view of the fact that *Arroyo-Angulo* was decided after the trial in this case, and considering the "inevitability of defense counsels' attack on [Geronimo's and Bruce's] credibility", *Arroyo-Angulo, supra*, 580 F.2d at 1147, the error in admitting the agreements on the Government's

direct examination cannot be deemed sufficiently prejudicial to warrant reversal. The agreements were used by the prosecution here only to show the express terms of the understanding between the witnesses and the Government, and there was no improper argument on the part of the prosecutor, either during examination of the witnesses, or during openings or summation, which would constitute improper vouching. The jury was repeatedly told that they, and they alone, had the duty of considering the witnesses' testimony and of giving it the weight they thought due to it. Appellants were thus not prejudiced by the improper timing of the introduction of the agreements.

VII.

Error is also asserted in the refusal of the trial court to suppress evidence derived from an electronic surveillance device (referred to as a "bug") which had been installed at the Harlem River Motors Garage, the locale of much of the narcotics traffic. The court order for the installation of the bug was obtained on February 9, 1977, upon the affidavits of DEA Special Agent Pavlick (the Agent) and an Assistant United States Attorney. The period of interception was from February 18, 1977 to March 10, 1977. Five tapes which resulted from this interception were received in evidence. Defendant Hatcher had made a motion, orally denied, to suppress the tapes on the ground that the Agent's affidavit contained "false and/or perjurious allegations". The motion was subsequently renewed after the Government had disclosed to the court and to defendants that an informant, Promise Bruce, had recanted certain information which he had given to the Agent and which the Agent, in turn, had included in his affidavit. The court below ruled that no facts had been advanced which suggested that Pavlick had known when he submitted his

affidavit that any information was false, and further held that, even omitting Bruce's information, the application still set forth facts constituting probable cause.¹⁶

16 The Pavlick affidavit in support of the surveillance warrant had included a paragraph 25, which detailed information given by informant Geronimo, then known only as "Confidential Source Four". The paragraph stated that, on November 23, 1976, defendant Fisher had offered to arrange a sale of heroin to Geronimo, and that he had stated that the heroin was coming from defendant Rollock, who had (allegedly) told Fisher that the source was Barnes. On November 24, according to the affidavit, Geronimo and undercover Agent Diaz had talked with Fisher, who had again stated that the source of the heroin was Barnes. The affidavit also stated that the reliability of the statement was corroborated by a tape recording of the conversations. The transaction contemplated by the parties to the conversation (i.e., the Rollock transaction) occurred on November 29, and evidence concerning it was given at trial.

Both Geronimo and Agent Diaz testified at trial that they had met with Fisher on November 24, 1976, to arrange the transaction. On the tapes of the conversations, however, Fisher was shown not to have stated explicitly that "the source was Barnes"; rather, when Diaz had indicated that he would feel better if he knew that the heroin was coming from "Nicky", Fisher had responded that "it was through the same source". (See Tr. 4233-4234, Ex. 101). Again on November 29, Fisher apparently did not know the exact source, but he had agreed to check out Rollock's source and to meet with Diaz later that evening. According to Geronimo's testimony, Geronimo and Fisher had driven around between 5:00 and 8:15 that afternoon, returning to Diaz afterward. Geronimo stated that Fisher had then told Diaz that the heroin was coming from defendant Hayden, but that it was "more or less blessed by Barnes". (Tr. 2053-2055, 4243).

Later in the trial, the defense had called another DEA Agent (Lawler), who had conducted a surveillance of Fisher on November 29. Lawler testified that, after Fisher had met with Diaz in the afternoon, Fisher had driven to the garage in an apartment complex in the Bronx and had parked. Lawler also stated that he had waited about one hour and had not seen the automobile leave.

These are the circumstances underlying appellants' first contention as to the suppression issue. They argue that the Pavlick affidavit was misleading and incomplete, especially insofar as it omitted the facts brought to light by Lawler's testimony, which, it is contended, established that Geronimo had lied and was not as credible as Pavlick had represented.

Appellants also cite the information given by informant Promise Bruce, then identified as "Confidential Source Five", who was on salary from the DEA prior to the "bug" application. Bruce's information had been incorporated into the Pavlick affidavit, but Bruce recanted in

The primary issue on this subject is whether the Agent knew that his statements were "false and/or perjurious" or were "deliberately misleading" misstatements of fact as otherwise known to him, for, unless the *affiant* committed a knowing falsehood or "other imposition" on a judicial officer, *United States v. Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), cert. denied, 397 U.S. 1002 (1970), suppression is not required. In *United States v. Merchant Diamond Group, Inc.*, 565 F.2d 252 (2d Cir. 1977) (per curiam), this court repeated the established rule that "[p]robable cause is not defeated because an informant may have erred or lied, 'as long as the affiant accurately represented what was told him'." *Id.* at 253, quoting *Mapp v. Warden*, 531 F.2d 1167, 1172-73 (2d Cir.), cert. denied, 429 U.S. 982 (1976), quoting in turn *United States v. Sultan*, 463 F.2d 1066, 1070 (2d Cir. 1972). Indeed, since the date of oral argument in this case, the Supreme Court has itself dealt with the issue of the necessity for a hearing in the face of allegations of false statements in affidavits supporting search warrants. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held that, as a matter of Fourth Amendment law, a hearing was to be afforded to a defendant who made "a substantial preliminary showing" that an affiant had knowingly and intentionally made a false statement in an affidavit, or had included such a statement with reckless disregard for the truth, but only "if the

early March 1977, while the "bug" was still in operation pursuant to an extension order. The Government made the fact of Bruce's recantation known to the district court and to the defense, and, in fact, did not introduce tapes of interceptions made after Bruce's recantation.

Appellants argue that, regardless of whether Pavlick knew that the Bruce information was false, Bruce should be considered a Government agent, whose perjury should vitiate the warrant. We do not think that this argument merits extended discussion. An informant, whether paid or not, is simply not a Government "agent" within the meaning of search and seizure law.

allegedly false statement is necessary to the finding of probable cause". *Id.* at 156. The Court expressly limited its holding, stating that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant". *Id.* at 171. Thus, the rule is clear that, absent a showing that Pavlick himself had knowingly included false statements in his affidavit, there is a basis neither for a hearing, nor for suppression itself. Furthermore, as held by the court below, even if false statements had been included, since probable cause remained even in the absence of the allegedly falsely stated facts, no relief was necessary.

There is nothing in the record to indicate that Pavlick had been aware, prior to submitting his affidavit, that the information provided by Geronimo and Bruce had been false. As the Government argues, there was no showing that Pavlick, at the time of the affidavit, knew of Lawler's surveillance on November 29, even assuming that such knowledge should have been included if known. Even if Pavlick had been made aware of Lawler's surveillance efforts on November 29 at the time he (Pavlick) applied for the "bugging" authority, there is nothing which would have alerted him to any inconsistency, for the informant's statement did not detail the activities of Geronimo and Fisher during the three-hour period in dispute, see note 16 *supra*, which was the period of Lawler's surveillance.

Furthermore, as the district court suggested, there was sufficient information upon which to find probable cause for the issuance of the surveillance order even without the allegedly false information: whether Geronimo and Fisher had driven around in a car for some three hours, or whether the car had been garaged for over an hour, might well be immaterial to the question whether electronic sur-

veillance was necessary. Furthermore, whether Fisher had stated on November 24th that the heroin was to be coming from Barnes or was from "Barnes' people", as the tape of Fisher's conversations proved to be the case, would not be determinative of the need for installation of the bug at the Harlem River Motors Garage. The suppression motions were thus properly denied.¹⁷

VIII.

Appellants urge that all sentences must be vacated because of the trial court's improper consideration in imposing sentence of their failure to cooperate. The subject of sentencing and the formulation of standards therefor, if such be possible, has recently received increasing attention from courts, bar associations, the bar and from the writers

17 We leave for another day the resolution of the question whether suppression is appropriate if an affiant *intentionally* misstates facts which are *immaterial* to a finding of probable cause. Under *Franks v. Delaware*, 438 U.S. 154 (1978), it is clear that no remedy is required as a constitutional matter. Arguably, in an extreme case, allegations of deliberate misrepresentations on the part of Government agents may suggest the need for a hearing to determine whether the perjury infects the proper administration of justice. Such is not the case here, however, for nothing suggests that Agent Pavlick acted in deliberate disregard for the truth of the statements offered in support of the application for the bug. Although paragraph 25 of the Pavlick affidavit omitted to mention the conversation on November 29, during the transaction between Geronimo, Diaz, and Fisher, concerning the "source" of the drugs, it cannot be said that the statement that the heroin was "coming from Barnes" was misleading, vis-a-vis the necessity for the "bug", since the tape of the conversation on November 29 indicated that Fisher had stated that the heroin had been "blessed by . . . Nicky's [Barnes'] people". This is not a case where a hearing is required.

As to appellant's argument, in a letter dated December 26, 1978, addressed to this court, concerning the need for a separate order authorizing entry into the Harlem River Motors Garage to install the "bug", we decline to reconsider our decision in *United States v. Scafidi*, 564 F.2d 633 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978). Furthermore, appellants' failure to raise the claim in the trial court bars their assertion thereof on appeal.

of various legal treatises. However desirable some standards may be to avoid present, frequently gross, disparities in sentencing, the fact will always remain, because of the many variables attached to each case, that each situation requires its own special treatment. Would that a simple algebraic formula consisting of the crime, times the defendant's history, times extenuating circumstances, which would equal the proper sentence, be productive of universally fair sentences; were this the case, the courts should be the first to welcome its adoption. In actual practice the rationale of sentencing is not that simple—nor should it be.

Although appellants would overly stress "failure to cooperate" as a motivating factor in the imposition of the sentences by the trial court, a review of the sentencing minutes shows it only to have been one factor which the court took into consideration. Each defendant's case and the degree of criminality was weighed and evaluated. The court followed the admonition: "Let the Punishment Fit the Crime".¹⁸

The cases cited by appellants are illustrative of the principle that each sentence should be imposed only after a consideration of the particular situation presented. *United States v. Ramos*, 572 F.2d 360 (2d Cir. 1978), on which appellants rely, involved a young man with no prior record of narcotics violations either as a distributor or a user, but who, for much needed money, had acted as a transporter (sometimes referred to as a "mule") of drugs (a first offense). He had cooperated to the extent of furnishing the name of the person for whom he had been acting but had ceased his cooperation because he "feared the consequences to his family". *Id.* at 361. It was quite obvious that this unusually harsh sentence (10 years' imprisonment plus

10 years' probation) was prompted by Ramos' refusal to continue his cooperation. In imposing sentence the Court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered. *United States v. Vermeulen*, 436 F.2d 72 (2d Cir. 1970). Thus, reference to a lack of cooperation as a factor does not render a sentence subject to resentencing because of any infirmity therein. The wide range of sentences imposed on the eleven defendants is convincing proof in itself that the court considered many factors in addition to non-cooperation in arriving at these diverse results. We find nothing in the record to require resentencing under *Ramos*.

IX.

Many of the appellants raise issues relating to the scope of the conspiracy or the sufficiency of the proof of their participation. The admissibility of alleged co-conspirators' statements is also challenged. A very brief summary of the principles governing conspiracy cases will, therefore, be useful. Specific facts concerning each appellant's connection to the Barnes conspiracy will be presented when each appellant's claims are discussed. Some of the facts which demonstrate how all the defendants are interconnected will be collected here along with the summary of the legal principles.

The gist of the offense of conspiracy is agreement. In determining what kind of agreement or understanding existed as to each defendant,

"[C]ourts often look to such factors as knowledge and dependency as evidence of an agreement. These factors, in turn, may be inferred from an assessment of the nature of the criminal enterprise and the defendant's role in it . . ." *United States v. Taylor*, 562

F.2d 1345, 1352 (2d Cir.), cert. denied, 432 U.S. 909, 434 U.S. 853 (1977).¹⁹

Therefore, if the Government can prove that a defendant was purchasing heroin from a middleman whom he knew was participating in a large organization which parcels out various tasks among its members, the jury may conclude that he agreed with those members even if he did not know their identities or locations. Importers, wholesalers, purchasers of cutting materials, and persons who "wash" money are all as necessary to the success of the venture as is the retailer. They can all be held to have agreed with one another in what has been called a "chain" conspiracy. *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962); *United States v. Bruno*, 105 F.2d 921 (2d Cir.), rev'd on other grounds, 308 U.S. 287 (1939). Knowledge of the organization's nature and the interdependence of the members justifies the inference of agreement.

Similarly, retailers whose existence is actually unknown to each other can be held to have agreed in a single conspiracy if each knew or *had reason to know* that other retailers were involved in a broad project for the importation, distribution, and retail sale of narcotics and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture. *United States v. Baxter*, 492 F.2d 150, 158 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974). The intermediate inference of knowledge is permissible if each retailer knows that the wholesaler or middleman handles

¹⁹ See also Note, *Resolution of the Multiple Conspiracies Issues Via a "Nature of the Enterprise" Analysis: The Resurrection of Agreement*, 42 Brooklyn L.Rev. 243 (1975); Note, *Federal Treatment of Multiple Conspiracies*, 57 Colum. L.Rev. 387 (1957); and cases cited in *United States v. Taylor*, 562 F.2d 1345, 1350-54 (2d Cir.), cert. denied, 432 U.S. 909, 434 U.S. 853 (1977).

a larger quantity of narcotics than one retailer can sell. Cf. *Blumenthal v. United States*, 332 U.S. 539 (1947).

Although the Barnes organization was loosely knit, several aspects of its operations serve to define a core group of wholesalers and retailers. The Government proved that many of the activities of the Barnes organization were geographically centered in two garages, Harlem River Motors Garage (owned or managed by Hatcher) and Kingdom Garage (managed by Fisher). The close proximity of the defendants' activities is one factor to be considered in finding that one conspiracy existed. See *Berenbeim v. United States*, 164 F.2d 679 (10th Cir. 1947), cert. denied, 333 U.S. 857 (1948). Besides serving as a focal point for narcotics transactions, the garages served to store the conspiracy's automobiles. Barnes, Baker, Monsanto, Hatcher, Hayden, and Hines drove cars which were registered to Hoby Darling Leasing Corporation; some of these defendants also operated cars registered to Kingdom Auto Leasing Corporation or Harlem River Motors.²⁰ (This group exhibited an almost unanimous appreciation of Mercedes Benzs; Hatcher operated ten different Mercedes Benz automobiles at different times during the investigation.) This court has found that the common use of automobiles and the "mingling" of the vehicles at the same garage and other gathering places can betoken the interlocking interests of the alleged co-conspirators, supporting the inferences of knowledge and dependency. *United States v. Valenti*, 134 F.2d 362 (2d Cir.), cert. denied, 319 U.S. 761 (1943) (conspiracy to manufacture and distribute illicit alcohol). Some members of the conspiracy even used the same De-

²⁰ Guy Fisher told Geronimo that a principal purpose for forming Kingdom Auto Leasing was to provide cars for Barnes' narcotics dealers in a manner which would prevent them from being forfeited if they were stopped by law enforcement officials with narcotics in them. (Tr. 1863-70).

troit tax attorneys (see discussion at p. 5624, *supra*). Finally, the conspirators frequented the same social clubs, where narcotics-related transactions occurred or were arranged.

In conjunction with the above facts, testimony of Geronimo, Bruce, and DEA agents with respect to their observations of the participants' activities serves to define the scope of the conspiracy. With all these facts before it, the jury was justified in concluding that there was one conspiracy (which we will call the Barnes conspiracy).

INDIVIDUAL CLAIMS OF APPELLANTS

It now becomes necessary to consider the arguments advanced by each appellant on issues primarily affecting him. If an appellant has attacked his conviction for conspiracy, additional facts showing his particular connection to the conspiracy will be presented.

X.

LEROY "NICKY" BARNES

Barnes was convicted of Count 1 (conspiracy), Count 2 (continuing criminal enterprise), and Count 3 (possession and distribution). On Count 1 no sentence was imposed in view of the imposition of a life sentence (and a \$100,000 fine) on Count 2. *See Jeffers v. United States*, 432 U.S. 137 (1977). On Count 3, Barnes was sentenced to 15 years' imprisonment, a special life parole term, and a \$25,000 fine. Barnes' principal point, other than error claimed with respect to the denial of his motions to suppress evidence (which we find without merit),²¹ is that there was insufficient evidence to sustain his conviction under Count 2.

²¹ The transcript of the state suppression hearing was properly considered under Rule 104(a) of the Federal Rules of Evidence. The fact

There can be little doubt that the proof presented at trial was adequate to place Barnes within the ambit of a conspiracy. One does not use \$150,000 worth of quinine a month for the altruistic purpose of curing the population of New York of malaria, or use mannite as a dusting powder. It was no coincidence (at least a jury could so find) that many defendants, including Barnes, chose the same Detroit tax firm to prepare their income tax returns or that the term "miscellaneous" was used to describe income running collectively to over a million dollars. The jurors were entitled to draw their own inferences from evidence of the galaxy of high-price automobiles, corporate-owned to shield them from forfeiture, used and/or leased by the defendants. The many money "washes" could easily be interpreted as an essential part of any narcotics distribution organization. The conspiracy count was thus properly supported, as was Barnes' conviction under substantive Count 3.

We are satisfied, moreover, that the evidence was sufficient to sustain Barnes' conviction on Count 2. The "Continuing criminal enterprise" statute, 21 U.S.C. §848, was aimed at the organizers of criminal conspiracies having five or more members. *United States v. Crisp*, 563 F.2d 1242, 1244 (5th Cir. 1977). Because conspiracy to distribute is a lesser included offense, *Jeffers v. United States*, 432 U.S. 137 (1977), evidence admissible on one count will generally be admissible on the other. *United States v. Crisp*, *supra*, 563 F.2d at 1244-45. It is well established that the out-of-court declarations of co-conspirators made in the course of and in furtherance of the conspiracy are admissible against

that the same counsel represented Barnes in the state hearing as in the instant case, as well as the fact that the issue was the same, supported Judge Werker's decision. Barnes presented no new arguments to Judge Werker.

all those involved in the conspiracy. Federal Rule of Evidence 801(d)(2)(E); *United States v. Manarite*, 448 F.2d 583, 590 (2d Cir.), cert. denied, 404 U.S. 947 (1971). Indeed, where the parties are engaged in a "concert of action" or "joint venture" involving criminal conduct, out-of-court declarations are admissible even though the indictment does not charge conspiracy. *United States v. Alsondo*, 486 F.2d 1339, 1346-47 (2d Cir. 1973), rev'd on other grounds sub nom. *United States v. Feola*, 420 U.S. 671 (1975); *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973); *United States v. Adams*, 446 F.2d 681, 683 (9th Cir.), cert. denied, 404 U.S. 943 (1971).

It is equally well established that the commission of a crime may be proven by circumstantial evidence. *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Glasser*, 443 F.2d 994, 1006-7 (2d Cir.), cert. denied, 404 U.S. 854 (1971); *United States v. Bowles*, 428 F.2d 592, 597 (2d Cir.), cert. denied, 400 U.S. 928 (1970). Moreover, to establish a defendant's guilt, the evidence need not be of such a nature as to exclude every reasonable hypothesis of innocence. *United States v. Aadal*, 368 F.2d 962, 964 (2d Cir. 1966), cert. denied, 386 U.S. 970 (1967). It must be examined in its totality, not by microscopic dissection of bits and pieces. *United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972); *United States v. Dardi*, 330 F.2d 316, 335 (2d Cir.), cert. denied, 379 U.S. 845, 869 (1964); *United States v. Monica*, 295 F.2d 400, 401 (2d Cir. 1961), cert. denied, 368 U.S. 953 (1962). Finally, the evidence on the whole must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942). If the proof, so viewed, is such that a jury, drawing reasonable inferences therefrom, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt, it is sufficient. *United States v. Taylor*,

supra, 464 F.2d at 244-45; *United States v. Glasser*, *supra*, 443 F.2d at 1007. The Government's evidence against Barnes, when examined in accordance with the above precepts, was sufficient to sustain his conviction under Count 2.

Section 848 requires that the defendant's narcotics violation must be part of a continuing series of violations which are undertaken in concert with five or more persons with respect to whom the defendant occupies a position of organizer, a supervisory position, or any other position of management and from which the defendant obtains substantial income or resources. The statute does not require that the five subordinates must act in concert at the same time. *United States v. Bolts*, 558 F.2d 316, 320-21 (5th Cir.), cert. denied sub nom. *Hicks v. United States*, 434 U.S. 930 (1977). As already discussed, Barnes' financially rewarding participation in a continuing criminal enterprise with five others was clearly established.

In determining whether Barnes played a supervisory role in this continuing enterprise, the jury could have considered the evidence concerning his negotiations for the purchase of large quantities of quinine and mannite and could have concluded that purchases such as these would not be made by an underling in the organization. The jury could also have weighed the evidence concerning Barnes' arrangements for "money-washing" and reached the same conclusion. Proof that Barnes rented two expensive apartments in New Jersey, masquerading in one as Hoby Darling and in the other as Wallace Rice, gave rise to a reasonable inference that he was entitled to exercise certain prerogatives of authority. Evidence that he was attended by bodyguards was likewise illuminating; ordinary narcotic dealers are not so carefully shielded. The jury could also conclude that narcotic underlings do not drive around with \$132,000 in cash in the trunk of their car.

Barnes' role in the December 29, 1976 transaction charged in Count 3 gave the jury an even clearer picture of his status. The convicted participants in this transaction were Barnes, Steven Baker, Steven Monsanto, James McCoy and Wallace Fisher. Under the rules of evidence above discussed, the declarations of the parties engaged in carrying out this concert of illegal action were admissible against their joint venturers. Fisher was Geronimo's entree into the Barnes' narcotics organization, and Geronimo testified that Barnes sent him and Fisher to Monsanto and that Monsanto was so informed. During the course of this transaction, Fisher, in conversations that were tape-recorded, stated that Barnes was the "boss". Fisher stated that he didn't even address Barnes as "Nick" but always called him "Sir". When Geronimo subsequently complained to Barnes about the quality of the heroin received from Monsanto, Fisher stated that Geronimo should not have done it, that "you don't confront a boss like that".

At a later date, when Geronimo and Diaz went with Fisher to the Harlem River Motors Garage to purchase additional heroin from Steven Baker, Barnes and his bodyguards were in the garage. Fisher told Diaz that "Nicky Barnes oversees all transactions that take place in the garage". Statements such as these from a co-venturer who was attempting to make the venture a success were properly admitted. See, e.g., *United States v. Johnson, supra*, 575 F.2d at 1358; *United States v. Bynum*, 566 F.2d 914, 926 n.8 (5th Cir. 1978); *Park v. Huff*, 506 F.2d 849 (5th Cir.), cert. denied, 423 U.S. 824 (1975).

Putting all the evidence together and looking at the totality of the proof, the jury could fairly and logically have concluded beyond a reasonable doubt that Barnes was indeed a boss who supervised the activities of his co-conspirators and was guilty of violating Section 848.

XI.

STEVEN BAKER

Baker was convicted of conspiracy (Count 1) and of two substantive counts (Counts 3 and 7) of possessing and distributing narcotic drugs. He was sentenced to fifteen years' imprisonment on each of Counts 1 and 3 to run consecutively, fined \$10,000 and given a special parole term of three years on both Counts 1 and 3. The sentence on Count 7, also 15 years and a three-year special parole term (plus \$10,000), was to be served concurrently with the sentences on Counts 1 and 3. To the arguments of the other defendants, which he adopts, Baker adds three points particularly applicable to him: (1) illegality of a post-arrest statement; (2) prejudicial joinder; and (3) admission of prejudicial hearsay.

The Post-Arrest Statement

Baker was arrested on March 15, 1977 and taken to DEA headquarters. Baker argues that after he and McCoy had been arrested, and while they were being taken to DEA headquarters in Manhattan, a DEA agent and others entered his apartment by means of keys taken from him, and seized drugs and other incriminating articles. Because these items were products of an illegal search, Baker argues, it was error for the trial court to refuse to suppress them. However, the Government made no attempt to introduce these seized items into evidence. Baker's claim, therefore, has to be and is, that he would not have made the admissions attributed to him (namely, that he dealt in drugs and was in a lot of trouble (Tr. 7772-7814)) but for his knowledge that the DEA had found incriminating items in his apartment—hence they were "fruit of the illegal search". (Baker Br. 21).

While Baker was at DEA headquarters, he was shown a videotape of himself carrying bags containing mannite into his apartment building. It was under these circumstances that Baker said: "I have seen enough" (Tr. 7778); and "I'm not trying to hide anything. I'm guilty". (Tr. 7784). The trial court had heard the testimony of DEA agents, an Assistant United States Attorney, and Baker himself. The spontaneity of Baker's reaction to the videotape would appear to support the trial court's conclusion that Baker's statement "was not occasioned by reason of the fact that in advance of having given it, Steven Baker knew that his apartment was searched". (Pre-trial Tr. 373). The trial court further found that Baker's statement, insofar as it was given after *Miranda* warnings, "is admissible and that none of his rights have been violated. . . ." (Pre-trial Tr. 373). The trial court's decision is supported by the record; there was no error.

Illegal Joinder

Baker's claim of illegal joinder is similar to that of his co-defendants, namely, that he was not part of a Barnes conspiracy. He identifies himself in his drug dealings only with Monsanto and McCoy and with them only in "isolated transactions". (Baker Br. 27). However, there was testimony from which a jury could infer that the transactions were more than isolated and that Baker was, in fact, a member of the Barnes conspiracy.

The evidence revealed that Baker and Monsanto operated as partners within the Barnes organization. Informant Wooden testified that Monsanto had introduced Baker as his partner when they were discussing a large importation of heroin. (Tr. 5382). Baker and Monsanto cooperated on the December 29 sale of a half-kilogram of heroin to Fisher and Geronimo. (Tr. 2130-2150, 4292-4305). Ger-

onimo saw Baker, Monsanto, and Fisher in the Harlem River Motors Garage office with stacks of money on the desk. On the same day, Monsanto was later seen handing packages of white powder to people in a limousine. Baker told Fisher and Geronimo to come back later because they were doing bigger deals at the moment. Subsequently, Fisher said that Baker was supposed to come with the "package".

The connection to the Barnes conspiracy lies, in part, in the fact that it was Barnes who had directed Geronimo, who was trying to consummate a deal with Monsanto, to see Monsanto at the Harlem River Motors Garage at that time on December 29. Barnes said that Monsanto would be there for "other reasons". (Tr. 2128-29). Combined with Fisher's statement that Barnes oversaw all transactions in the Garage, these facts created a solid foundation for the jury's conclusion that Baker was part of the Barnes conspiracy. Additional support can be found in Baker's use of Hoby Darling Leasing Corporation automobiles. Finally, the cooperation between Baker and other members of the Barnes organization is revealed by the evidence that on February 25, 1977, when Fisher and Diaz were trying to consummate a transaction with Baker at the Garage, McCoy said that Baker had been warned to stay away because there was a lot of police activity in the area. McCoy intimated that Barnes had warned Baker. Tape recordings made by the "bug" in the Garage on February 25th reveal that Barnes was in the Garage and was engaged in narcotics-related activity.

Thus, Baker was properly joined as a defendant. For the same reasons, the hearsay statements of his co-conspirators were properly admitted against Baker.

We affirm Baker's convictions on all counts.

XII.

WALTER CENTENO

Centeno, who was found guilty of conspiracy on Count 1 and one substantive count for possession and distribution (Count 5),²² claims that he participated only in a single transaction which is "insufficient to support his conviction of conspiracy". (Centeno Br. 14).

Despite this claim, there was testimony that Centeno had participated in washing \$6,000 (Tr. 2250-53) and that he had been involved in the sale and delivery of 250 "quarters" of heroin to Promise Bruce. The evidence showed that Bruce had agreed to purchase 250 "quarters" of heroin from Hines and that Bruce was to receive samples in advance. On or about March 14, 1977, Centeno, who called himself "Chico Bob", came to Bruce at a bar and delivered the samples. Final delivery of the 250 "quarters" was made in the parking lot of a supermarket by Centeno, who had brought the "quarters" in the trunk of his car to Bruce and Mary Buckley, a DEA Agent.

There is no question that Centeno was involved in the retail end of the Barnes narcotics operation. Furthermore, since he carried out a money wash in the summer of 1976, he had knowledge that a successful narcotics operation, like the one for which he was a retailer, involves a division of labor. The jury could properly infer that Centeno had knowledge of others above him in the chain of distribution and that he was dependent on their activities; thus, the jury could find that he had conspired with all the others in the organization. There was testimony that Hines, the principal in the sale of the "quarters", worked

²² Centeno was also charged with unlawful possession of a firearm (Count 6), but was acquitted on that count.

for Monsanto; Centeno was thus tied in to the very core of the Barnes conspiracy. (Tr. 6449).

With respect to Centeno's "*Massiah*" claim, there was no relationship between Centeno's identification of himself as "Chico Bob" and a previous (sealed) indictment. The substantive crime for which Centeno was here prosecuted was not consummated until the evening of March 14th, and was a part of a continuing investigation; hence, the circumstances of Centeno's revelation of his nickname were not within the doctrine of *Massiah v. United States*, 377 U.S. 201 (1964). Centeno's statements were clearly admissible.

We affirm Centeno's conviction on both counts.

XIII.

WALLACE FISHER

Wallace Fisher was convicted of conspiracy and three substantive counts (Counts 3, 4, and 11) charging sale and possession with intent to sell. He was sentenced to a term of up to eight years' imprisonment under the Youth Corrections Act. 18 U.S.C. §§ 5010, 5017(d).

Fisher adopts the arguments, applicable to him, made by the other appellants and urges three additional points of error as to him, namely: (1) that the court refused to charge the jury on entrapment; (2) that the court denied motions to sever his case; and (3) that the evidence was insufficient to prove that he was a member of an unlawful conspiracy.

Entrapment

The law of entrapment in this Circuit is clear, and follows the teachings of Judge Learned Hand in *United States v. Sherman*, 200 F.2d 880, 882-83 (2d Cir. 1952). As

Judge Hand there stated, an entrapment claim presents two issues:

"(1) did [a Government] agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it".

Although resolution of the issues raised in a claim of entrapment is largely factual, in deciding whether there are disputed issues requiring jury determination, the trial court must be guided by the proof in the record at the time of making its decision to grant or deny a charge on the defense. The mere assertion of entrapment does not automatically require a charge thereon; nor does a mere showing that there was in fact Government inducement. Even if the accused had met his burden in showing inducement, once the Government has proved propensity by "substantial evidence" which stands uncontradicted, a charge on entrapment is properly denied. *United States v. Licursi*, 525 F.2d 1164, 1167-69 (2d Cir. 1975).

Fisher claims that his "entrapment" commenced on November 12, 1976, when Geronimo, on behalf of the Government, visited Fisher's home in an endeavor to "persuade" him to become part of a strategy to infiltrate the so-called Barnes organization. Since Fisher was not at home, the inducements of participation—particularly the financial inducements—were disclosed to one Gwendolyn Hardy, then living with Fisher, and to Fisher himself later that day. Fisher was somewhat reluctant, and he hesitated for several days. Fisher's counsel would depict

Fisher as having been very much under the influence of Geronimo at that time, and as a person anxious to accommodate Geronimo and to do his bidding, as well as that of Government Agent Diaz. Certainly, the Government "inducement" was shown.

However, the Government claims that the undisputed evidence showed that Fisher had been in the narcotics business long before November 12, 1976—that from late 1974 or early 1975, he had been involved with his brother Guy Fisher in cutting and bagging drugs; and that he had trafficked in cocaine and angel dust prior to November 1976. This evidence, according to the Government, definitely established that Fisher had a propensity or predisposition to deal in drugs long before Geronimo approached him in November 1976. We agree.

Fisher's brief on the entrapment point omits many facts—facts which the trial court had before it when it decided that a charge on entrapment was inappropriate. Indeed, as the Government points out, for a period of five years prior to November 1976, Fisher, according to Geronimo, had been "bagging and cutting drugs for his brother", and had told Geronimo about the substantial "amount of money to be made within the drug business itself" (Tr. 1859). When, in Spring 1975, Geronimo sought to buy heroin from Fisher, Fisher sought to buy some through Leon Johnson, but Johnson could only supply him with cocaine (Tr. 1853-55). There was evidence that Fisher himself, prior to November 1976, had dealt in cocaine and angel dust (a narcotic) (Tr. 1859-63, 1890). And again, Geronimo testified that it was Fisher who had urged Geronimo to give "more thought" to becoming "involved in the drug business" (Tr. 1905). It was against this background, according to the evidence, that Geronimo, in November 1976, had sought out Fisher.

Fisher's prior activities were proved by evidence that stood uncontradicted in the record. Indeed, aside from Geronimo's testimony, there were taped statements made by Fisher himself, uncontradicted, to show that his involvement was extensive and willing. In view of this evidence, Fisher's initial reluctance, or desire to have time to "think it over", was insufficient, of itself, to negate the evidence of predisposition. *See United States v. Reed*, 526 F.2d 740, 743 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976). Since there was no evidence to contradict the Government's evidence of propensity, on the facts before the trial court, Judge Werker was justified in denying a charge on entrapment. *United States v. Licursi, supra*, 525 F.2d at 1167-69.

Severance

In an endeavor to destroy Fisher's credibility (because much of the evidence implicating the co-defendants had come through Fisher's actions and declarations), co-defendants' counsel argued to the jury that Fisher's record showed that he was a liar, a cheat, a "con man", and a "dupe", willing to serve Geronimo's ends. The jury was told that Fisher had previously been arrested on a drug charge. On the basis of what has been described as this "incessant character assassination" (Fisher Br. 26), Fisher's counsel, on several occasions during trial, sought a severance, claiming prejudice to his client. The trial court denied the severance. Fisher claims an abuse of discretion.

In a multi-defendant narcotics trial, it is not unusual for some defendants to claim that others are more culpable, and that they should be acquitted, even if others are found to be guilty. Here, it was in the interest of all of the defendants, *including Fisher himself*, to try to establish his unreliability.

There is no way to avoid some "spill-over effect" of testimony in such multi-defendant trials except through the judge's charge. The procedural rules with respect to joinder have been drafted with judicial economy in mind, as well as the protection of individual defendants' rights. In this case, fifteen trials could have been required. Certainly, to have fifteen trials was not required. Indeed, the decisions as to joinder vary as do the facts. The discriminating process of jury analysis can only be tested by the results. Here, some defendants were acquitted of various charges; others were convicted. If testimony spilled over, it did not contaminate all. Judge Werker's decision to deny a severance was thus a proper exercise of his discretion.

Insufficiency of the Evidence

Finally, Fisher argues that the evidence indicates only that he was a member of a "purchasing team", and hence was not a seller of heroin. This, of course, would not excuse him from conspiratorial liability. A drug conspiracy customarily involves both the purchase and sale of drugs.

Further, the Government showed that Fisher's involvement was more far-ranging than simply having conspired with Government agents, for which no conspiratorial liability could be imposed. The jury could properly infer that Fisher had agreed with other members of the conspiracy to promote its ends. Fisher's comments to Geronimo revealed that he was fully aware of the scope and nature of the conspiracy. His actions as a "middleman" in three transactions with different "arms" of the conspiracy constituted sufficient evidence of knowledgeable participation in the operations of the conspiracy with an expectation of benefiting from them.

Fisher's convictions are in all respects affirmed.

XIV.

JOHN HATCHER

Hatcher was convicted of conspiracy (Count 1) and of a substantive count for possession and distribution of 457.42 grams of heroin (Count 4).

Hatcher argues that the Government failed to establish by competent evidence his participation in the Barnes conspiracy and that certain evidence against him was improperly admitted. His claim that he was prevented from calling witnesses who would have established the existence of a Stepeney-Franklin organization at Harlem River Motors Garage has already been addressed in Part IV *supra*. Hatcher's other claims have no merit.

Proof of Participation in the Conspiracy

Hatcher's argument is that there was no evidence of his participation in the conspiracy other than the March 11, 1977 sale of heroin to Fisher and Diaz. However, strong evidence was introduced at trial which supports the jury's verdict.

The evidence tended to show that Hatcher was in the business of selling wholesale quantities of heroin on a continuing basis. Apart from the March 11 sale, there was testimony that he offered, on December 23, 1976, to sell Geronimo and Fisher a half-kilogram of heroin for \$26,000. At that time he showed Geronimo a sample which he pulled from beneath the seat of a Mercedes parked in the Harlem River Motors Garage.

The jury could properly infer that Hatcher had knowledge of the activities of other conspirators. He was at the Harlem River Motors Garage on December 29, 1976, when Monsanto sold heroin to Fisher and Geronimo, the same

night that Geronimo saw packages of white powder being transferred to a car in the Garage. Moreover, he carried out his own heroin sale at the same locale as his co-conspirators.

The jury could also conclude that Hatcher benefited from the activities of other Barnes conspiracy participants. Hatcher operated 13 automobiles registered to Hoby Darling Leasing Corporation during the course of the investigation, benefiting from an operation which was run by the conspirators in aid of their illicit business. In addition to this objective evidence, there was testimony that Fisher believed Hatcher to be the owner of Harlem River Motors Garage, the chief business of which seems to have been the sale of heroin. When examined in its entirety, the evidence justifies Hatcher's conviction for conspiracy.

Admission of Allegedly Inadmissible Evidence

The first bit of evidence challenged by Hatcher is Fisher's statement to Diaz and Geronimo that "Nicky oversees all transactions [sic] that take place in the garage" (Geronimo version) (Tr. 2356) or "Nicky Barnes was into everybody's action" (Diaz version) (Tr. 4419), and that this statement was allegedly so unreliable that its admission was in violation of the Sixth Amendment Confrontation Clause. We conclude that this statement was not so lacking in indicia of reliability as to violate Hatcher's constitutional rights. Fisher's and Geronimo's credibility and the weight to be given the statement were questions for the jury.

Hatcher also attacks the admission of Diaz's testimony that the letters "BO", a nickname for Hatcher, appeared on the wrapping of the package containing one-half kilogram of heroin which Hatcher sold to Geronimo and Diaz. The

Government argued in summation that this writing established that Hatcher was the source of the heroin given by Fisher to Diaz on March 11, 1977. Diaz did not know who had written the notation or the circumstances under which it had been written. Therefore, argues Hatcher, admission of Diaz's testimony that this was Bo's package and that he was the source constitutes reversible error on the grounds that it was hearsay and in violation of the Confrontation Clause.

There was testimony, however, that Geranimo had discussed the sale of one-half kilogram of heroin for \$25,000 with Hatcher and that the method of delivery (in Fisher's Corvette) had been pre-arranged. The package containing the heroin indeed bore the letters "BO", as related by Diaz. The evidence in no way violated Hatcher's rights. It provided circumstantial proof that Hatcher was the source.

We affirm Hatcher's conviction on both counts.

XV.

JOSEPH HAYDEN

Joseph "Jazz" Hayden, convicted of conspiracy on Count 1, was sentenced to fifteen years' imprisonment, a \$25,000 fine, and special life parole. He attacks his conviction on the ground that the proof was insufficient to establish his participation in the conspiracy beyond a reasonable doubt. He also claims to have been deprived of his right to call witnesses in his behalf, because of a direction by the trial court that, if his counsel were to testify, he would have to obtain other trial counsel on very short notice.

Proof of Participation in the Conspiracy

Diaz carried out a \$47,000 money "wash" for Hayden on January 19, 1977. At that time, according to Diaz, he

and Hayden discussed the prior negotiations concerning Fisher's and Geronimo's attempts to purchase heroin from Hayden. In a later conversation, Hayden quoted Diaz a price of \$25,000 or \$26,000 for a half-kilogram of heroin and said he would have to consult "his Boss". These conversations were an adequate basis for the jury to infer that Hayden was in the narcotics business and had to "wash" the receipts from that business.

Hayden's counsel argued at trial that Hayden undertook to change \$47,000 in small bills into large denominations as a result of his ownership of several Harlem "after hours" clubs which generated a large cash flow of small denomination bills. To accomplish this conversion, he used DEA Agent Diaz as a dupe who would perform the service without a fee. Hayden's counsel had an opportunity to present his version in his summation, as did the Government. The jury apparently chose the Government's view. The evidence was certainly sufficient to sustain their choice.

The evidence tended to support the Government's claim that after Guy Fisher was jailed, Hayden became one of Barnes' chief lieutenants. Hayden's tax return for 1976 reported \$136,460 as "miscellaneous income"—a substantial increase over the previous year's \$67,500. These figures corresponded with a decrease in Guy Fisher's earnings resulting from his incarceration. There was evidence that Barnes and Hayden together arranged the December 16, 1976 "wash" of \$10,000. In addition, Hayden drove automobiles registered to Hoby Darling Leasing Corporation and to Kingdom Auto Leasing Corporation. Since "money washing" is integral to the success of a narcotics conspiracy and since there was evidence that Hayden should have known of the activities of other conspirators, Hayden's conviction of conspiracy was proper.

Right to Call Witnesses

In the §3500 material relating to Geronimo's testimony which the Government turned over to defense counsel there appeared an assertion by Geronimo that he had information that Hayden's counsel had allegedly bribed a state judge in an unrelated case. Hayden's counsel advised the trial court that he wished to present evidence, including his own testimony, to show that Geronimo was lying and that such proof would accentuate defense arguments that Geronimo was an unbelievable witness.²³

The Government advised Hayden's counsel that it had no intention of bringing out any bribery issue on direct examination. However, counsel stated that he wished to go into the matter upon cross-examination. It was against this backdrop that the trial judge offered Hayden a three-day adjournment to obtain new counsel in the event that his then-counsel chose to testify, although he expressed the opinion that counsel's proposed testimony would be so collateral as not to be admissible. Such a conclusion, in our opinion, would have been justified and within the court's discretion. As to the shortness-of-time argument, Hayden's counsel did not commence his cross-examination of Geronimo until some eleven days after the §3500 disclosure. Furthermore, counsel's decision not to testify was made after a strategy discussion which included all defense counsel. No reversible error is to be found in this situation.

In sum, Hayden's conviction is affirmed.

23 The discussions concerning Hayden's counsel's possible desire to take the witness stand took place in the trial court's chambers and were transcribed by the court reporter. Judge Werker ordered that the transcripts be sealed. Because the Government does not oppose the defense motion to unseal these pages, we have granted the motion as to Tr. 1965-76, 1999-2007, 2103-7. The transcripts of these discussions do not reveal any facts which would change the conclusion we have reached.

XVI.

WAYMIN HINES

Hines was convicted of conspiracy (Count 1) and of a substantive count of possession and distribution of heroin (Count 5). He was sentenced to consecutive 15-year terms of imprisonment, fines of \$10,000 on each count, and a special parole term of three years. He makes the argument, applicable uniquely to him, that he was deprived of his Sixth Amendment rights to the assistance of counsel and to confront witnesses by: (1) the prosecution's failure to disclose prior to trial its intent to use a former client of Hines' trial counsel as a prosecution witness; (2) the trial court's failure to conduct a hearing into the nature of the conflict between the witness and Hines' counsel, to inform Hines of the problem, or to give Hines an opportunity to express his views; and (3) the trial court's refusal to permit Hines' counsel to seek a waiver of the attorney-client privilege from his former client so as to permit him to cross-examine the witness effectively. He also attacks his conspiracy conviction and the admission of certain evidence.

Trial Counsel's Former Client as a Witness

Midway through the trial, the Government advised the defense that it would call Jerome L. Christian as a witness. Christian had been represented in a related criminal matter by Hudson Reid, Esq., who was then acting as trial counsel for Hines. The previous representation had involved charges that Christian in 1974 had sold narcotics to DEA agents.

The reason given by the Government for not disclosing its intention to call Christian at an earlier date was that,

until the night before he testified, there was a substantial probability that Christian would refuse to testify. The prosecutor gave an assurance that "[t]here will be absolutely no testimony from Mr. Christian about Waymin Hines in any way"—only against the defendant Guy Fisher. (Tr. 5611).

After an order of immunity had been obtained and a Criminal Justice Act attorney had been appointed, Christian proceeded to testify for 122 pages of the transcript, including direct, cross, redirect and recross. A reading thererof discloses no reference to Hines, directly or indirectly.

Reliance upon such recent cases as *Holloway v. Arkansas*, 435 U.S. 475 (1978); and *Salomon v. LaVallee*, 575 F.2d 1051 (2d Cir. 1978) is inapposite. These cases involved dual representation with obvious actual or potential conflicts. Even in such situations (which is not the case here), "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist . . ." *United States v. Carrigan*, 543 F.2d 1053, 1055 (2d Cir. 1976).

Counsel for Hines was not precluded from cross-examining Christian. Nor does he point out the field into which he felt he was precluded from entering. It is to be doubted that he would have sought to open up a relationship between his client and Guy Fisher. In the absence of guidance by counsel as to any possible prejudice to Hines, our review of the record discloses none.

Conspiracy-Related Claims

Hines claims that although one conspiracy was charged in the indictment, several were proved at trial, and that this variance was prejudicial. As noted earlier, there was

substantial evidence which enabled the jury to conclude that one conspiracy had been proved. Hines operated three Jaguars registered to Hoby Darling Leasing Corporation during the investigation. Geronimo testified to his observation of Hines' activities with Guy Fisher, including one transaction for a package of white powder outside the Kingdom Garage. This independent evidence, in connection with the evidence of Guy Fisher's role in the Barnes conspiracy, tied Hines into the single Barnes conspiracy.

Hines also challenges the admission of two allegedly hearsay statements which Geronimo repeated during his testimony. Angel Brown told Geronimo that she worked for Gary Saunders, who in turn worked for Hines and Guy Fisher and that she received from Saunders up to 3000 heroin quarters a week to sell through her crew of women retailers. Geronimo further testified that he had seen a man named David receive a paper bag from Hines. David then told Geronimo and Fisher that he had just picked up 1500 quarters of heroin from Hines.

Geronimo's independent observations of the connections among Hines, Angel Brown, Gary Saunders, and David satisfy the test of *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), cert. denied sub nom. *Lynch v. United States*, 397 U.S. 1028 (1970). Geronimo testified to a transaction involving Guy Fisher, Hines, and Saunders. Later, he saw Saunders give Brown envelopes of white powder. Similar observations justify admission of David's statement.

We find Hines' other arguments, including the claim that the hearsay statements were not in furtherance of the conspiracy, to be without merit and we affirm his conviction.

XVII.

LEON JOHNSON

Johnson was convicted of conspiracy (Count 1) and of two substantive counts (Counts 12 and 13), each involving separate sales of cocaine. He was sentenced to fifteen years' imprisonment on Count 1, plus a \$10,000 fine, and three years' special parole; and a fifteen year sentence and three years' special parole on Count 12. A similar sentence on Count 13 was to run concurrently with the sentence on Count 12.

Apart from joining the arguments made by the other defendants in their joint brief, Johnson does not attack his convictions on Counts 12 and 13. He challenges his conviction for conspiracy on the grounds that there was no evidence connecting him to the Barnes conspiracy and that if he was guilty of conspiracy, it was a conspiracy different from the single conspiracy charged in the indictment. He was the only defendant who requested the trial court to instruct the jury with respect to proof of multiple conspiracies where a single conspiracy was charged. We conclude that there was sufficient evidence to support the jury's verdict that Johnson was a member of the Barnes conspiracy.

The indictment charged a conspiracy to sell heroin *and cocaine*. Besides the proof that Johnson sold cocaine to Promise Bruce, there was evidence that allowed the jury to conclude that Johnson negotiated on Barnes' behalf to buy cut from Bruce. Bruce testified that he discussed a proposed sale of cut with Johnson on January 10, 1977, at the Scales Social Club. Johnson explained to Bruce "that Nicky wanted numbers and prices and amounts and that Nicky is not going to deal with nobody else. . ." (Tr. 6422-23). Several weeks earlier Johnson had received

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a sample jar of quinine from Bruce and had promised that he [Johnson] would give the jar to Nicky and let him check it out. (Tr. 6415). Johnson's act of removing himself from the negotiation with the suggestion that Bruce deal directly with Barnes did not erase his participation in the conspiracy as Barnes' agent. In addition, there was evidence that Johnson operated automobiles registered to Hoby Darling Leasing Corporation. The above facts combine to tie Johnson to the single Barnes conspiracy described elsewhere in this opinion.

Finding no merit in Johnson's other arguments with respect to his conspiracy conviction, we affirm his convictions.

XVIII.

JAMES McCoy

McCoy was convicted of conspiracy (Count 1) and substantive offenses for possession and distribution of heroin (Counts 3 and 7) and for possession of firearms (Count 8). He was sentenced to 15 years and three years special parole to run concurrently as to Counts 1, 3 and 7, and to five years on Count 8—the gun possession count.

McCoy raises a special point applicable only to him: the trial court's failure to suppress guns found in a locked glove compartment of the car he had been driving at the time of his arrest. The car, which was subject to forfeiture,²⁴ was taken to a DEA garage where, some three days later, as part of a warrantless inventory, the glove compartment was broken into, and two guns and various capsules were discovered. The admission into evidence of the guns and narcotics, McCoy claims, was highly prejudicial to his case. McCoy would distinguish his situation from

that before the Supreme Court in *South Dakota v. Opperman*, 428 U.S. 364 (1976), because in *Opperman* the glove compartment was "unlocked". However, in *Opperman*, the car itself was locked. Where there is a duty to "inventory", there should be a concomitant privilege to use reasonable means to gain access for this purpose. The trial court properly denied the motion to suppress.

In any event, the guns seized in this inventory procedure were the subjects of Counts 9 and 10 of the indictment, on which McCoy was acquitted. Even if improperly seized, the admission of these guns was harmless. McCoy's conviction on Count 8, a gun possession charge, stemmed not from the guns recovered from the glove compartment, but rather from the gun found on his person when he was arrested.

XIX.

STEVEN MONSANTO

Monsanto was convicted of conspiracy (Count 1) and of a substantive offense for possession and distribution of heroin (Count 3). He was sentenced to 15 years on each count plus a \$10,000 fine on Count 1 and three years' special parole on Counts 1 and 3.

Monsanto's main point relates to the trial court's admission of evidence of Monsanto's participation in a plan to import 300 pounds of heroin and to assemble some 50 guns, including sawed-off shotguns, machine guns and hand guns, the proof of which, he claims, was highly inflammatory and prejudicial, the prejudice far exceeding its probative value. Monsanto argues that the prosecution wilfully failed to reveal its intention to offer this proof, thus taking Monsanto by surprise. The Government replies that, consistent with the trial court's pre-trial ruling on non-disclosure of Gov-

ernment witness identity, for the safety of the informant, disclosure was withheld.

Monsanto would fit the evidence of the heroin importation scheme into the category of inadmissible "similar crime evidence". However, in view of Monsanto's trafficking in the sale of heroin, this proof would seem to be more closely related to a furtherance of the conspiracy. Its probative value was unquestionable. Certainly, the evidence of the importation scheme was relevant to the issue. The weapons could certainly have been indicative of "tools of the trade". Judge Werker's decision to admit the evidence was proper.

Other points relating to sentencing, the *voir dire* of the jury and the evaluation of a witness' testimony have been discussed elsewhere, and are without merit.

XX.

LEONARD ROLLOCK

Rollock was convicted of conspiracy on Count 1 and of one substantive charge for possession and distribution of heroin (Count 11). He was sentenced on Counts 1 and 11 to fifteen years' imprisonment and three years' special parole, the sentences to run concurrently. Rollock characterizes the sale charged in Count 11 as an "isolated transaction" which was insufficient to prove that he was a member of the conspiracy charged. We disagree.

The events which occurred in connection with the sale for which Rollock was convicted demonstrate his participation in the conspiracy. During negotiations with Rollock, Geronimo and Fisher agreed that they would purchase heroin from Rollock at the Kingdom Garage, a center for the narcotics activities of other defendants, on December 29, 1976. However, Rollock arrived late and said that he

woke up late, had missed a meeting with "Nick", and did not have the package with him. They set an appointment to try again at the Two Cousins Lounge that evening. During the afternoon of December 29th Fisher and Geronimo checked on the source of the heroin and reported to Diaz that it was coming from "Jazz" [Hayden] and was "blessed" by "Nicky". (Tr. 2054-55; 4242-43). The transaction was consummated that evening. Subsequently, Rollock told Geronimo and Fisher that "his people" thought that the purchase money was marked. Hayden later told Fisher and Geronimo that they had paid too much. With the evidence concerning this transaction before it, the jury could properly have inferred that Rollock was a member of the Barnes organization.

We affirm Rollock's convictions on both counts.

SUMMARY

In summary, we hold as follows:

BARNES

We affirm his convictions on Counts 1, 2 and 3.

BAKER

We affirm his convictions as to Counts 1, 3 and 7.

CENTENO

We affirm his convictions on Counts 1 and 5.

WALLACE FISHER

We affirm his convictions on Counts 1, 3, 4 and 11.

HATCHER

We affirm his convictions on Counts 1 and 4.

HAYDEN

We affirm his conviction on Count 1.

HINES

We affirm his convictions on Counts 1 and 5.

LEON JOHNSON

We affirm his convictions on Counts 1, 12 and 13.

McCoy

We affirm his convictions on Counts 1, 3, 7 and 8.

MONSANTO

We affirm his convictions on Counts 1 and 3.

ROLLOCK

We affirm his convictions on Counts 1 and 11.

MESKILL, Circuit Judge, dissenting:

I respectfully dissent. I am troubled by the implications of today's decision and the uses to which it may be put. "Cases of notorious criminals—like cases of small, miserable ones—are apt to make bad law. . . . The harm in the given case may seem excusable. But the practices generated by the precedent have far-reaching consequences that are harmful and injurious beyond measurement." *Abel v. United States*, 362 U.S. 217, 241-42 (1960) (Douglas, J., dissenting). In my judgment, the district court's decision not to disclose the names and addresses of prospective jurors and at the same time to prohibit inquiry into their ethnic and religious backgrounds on the *voir dire* was error. I would reverse the judgments of conviction and remand for a new trial.

During a pre-trial conference held on September 12, 1977, the trial judge announced, *sua sponte*, the procedures he had decided to follow in connection with the *voir dire* examination of prospective jurors. He said first that a panel of 150 prospective jurors had been drawn, that they would be assigned numbers 1 to 150, and that their names

would not be disclosed to counsel. He also said that the street addresses of the prospective jurors would not be disclosed, nor would their neighborhoods, police precincts, or firehouse or school districts. He did promise, though, to give counsel "a general impression as to where [the jurors] reside."¹ When questioned by counsel, the judge said that he would, in addition, prohibit inquiry into the ethnic and religious backgrounds of the prospective jurors, explaining that, "I do not feel that those are appropriate subjects for questioning."

The following week the judge informed counsel that he had decided to sequester the jury.² Counsel inquired whether, in view of the sequestration of the jury, the names, addresses, and ethnic and religious backgrounds of the jurors would still be withheld; the judge said they would be. When pressed for an explanation, the judge offered the following:

I think the jurors are entitled to their privacy and I think their families are entitled to their privacy.

In my view of the law, the law states that no juror shall be disqualified by reason of race, color or creed, and in my view of the law he could not be challenged on the basis of race, color or creed.³

1 On the *voir dire*, the prospective jurors were asked to disclose in which of the eleven counties of the Southern District they lived.

2 The government had moved that the jury be sequestered. There is no appeal from this decision.

3 Although the trial judge did not refer to it, this statement appears to be based on 28 U.S.C. § 1862, which provides as follows:

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

The jury was selected on September 26, 27, 28 and 29, and trial began on September 29. The jurors knew that their names and addresses were being withheld.⁴

On this appeal the government contends that the district court's decision to prohibit inquiry into the names, residences, and ethnic and religious backgrounds of the prospective jurors was both lawful and proper. At the time of the district court's announcement, however, and during the course of the discussion that followed, the government was noticeably silent. Indeed, at no time were the views of the United States Attorney on this matter either sought or expressed, and every time counsel for the defendants sought to challenge the district court's ruling, either orally or in writing, their requests were sharply denied. The appellants now argue that the cumulative effect of the trial judge's decision was so significant

4 When one of the attorneys suggested that, based on the sequestration order and the restriction regarding names and addresses, jurors would infer the "real" reason for the judge's decisions, namely, that the judge and the government believed that the jurors and their families might somehow be in danger because of their serving on the jury, the judge responded: "It has nothing to do with any real reason. I just do not want them interfered with, their privacy interfered with." When the judge told the prospective jurors that they were not to disclose their names and addresses and that the petit jury would be sequestered during the course of the trial, he explained that his decisions were based on the likelihood of extensive publicity regarding the trial, the possibility that the media would attempt to interview members of the jurors' families, and the desire to protect not only the impartiality of the jurors' deliberations but also the privacy of the jurors and their families.

Ironically, the majority opinion is itself substantial evidence of how difficult it might have been for the jurors to resist an inference as to the "real" reason for the decisions regarding juror names, addresses, and sequestration. The opinion is based largely on the "sordid" and all-too-often violent history of multi-defendant narcotics trials in the Southern District and the conclusion that the safety of the jurors and their families would have been in serious jeopardy but for measures guaranteeing juror anonymity.

that it denied them the ability to exercise meaningfully their right to peremptory challenge. I agree.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury” The right to an “impartial jury” is also grounded on principles of due process, *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961), and it is a right that may be secured by the exercise of our “supervisory powers,” see *Ristaino v. Ross*, *supra*, 424 U.S. at 597 n.9; *Hamling v. United States*, 418 U.S. 87, 140 (1974); *Aldridge v. United States*, 283 U.S. 308 (1931). Like so many constitutional requirements, however, it is no easy task precisely to define this mandate. “Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.” *United States v. Wood*, 299 U.S. 123, 145-46 (1936). At the same time, the constitutional right to an impartial jury “carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial.” *Ham v. South Carolina*, 409 U.S. 524, 532 (1973) (Marshall, J., concurring and dissenting). Under our system of criminal justice, several devices are available to serve that end. See, e.g., *Groppi v. Wisconsin*, 400 U.S. 505, 509-11 (1971) (change of venue); *Sheppard v. Maxwell*, 384 U.S. 333, 357-63 (1966) (control of publicity regarding trial). Of the available devices, however, the jury challenge is perhaps the most important, *Ham v. South Carolina*, *supra*, 409 U.S. at 532 (Marshall, J., concurring and dissenting), whether that challenge be “for cause,” where actual bias is admitted or presumed, or “peremptory,” where bias is suspected or inferred. See

Lewis v. United States, 146 U.S. 370, 376 (1892) (“The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of trial by jury.”). The ability of the defendants in this case to exercise the peremptory challenge is at the center of this appeal.

The peremptory challenge is “an arbitrary and capricious species of challenge,” one that can be based on “sudden impressions and unaccountable prejudices.” *Lewis v. United States*, *supra*, 146 U.S. at 376, quoting 4 Blackstone, Commentaries 353; *Pointer v. United States*, 151 U.S. 396, 408, 412 (1894). “The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.” *Swain v. Alabama*, 380 U.S. 202, 220 (1965). It permits rejection of a prospective juror “for a real or imagined partiality.” *Id.* at 220. See also *United States v. Newman*, 549 F.2d 240, 249 (2d Cir. 1977). In sum, it is a right given “to be exercised in the party’s sole discretion.” *Frazier v. United States*, 335 U.S. 497, 505 (1948). The purpose of the right of peremptory challenge is to aid the parties in securing a fair and impartial jury by affording them “an opportunity beyond the minimum requirements of fair selection to express an arbitrary preference among jurors properly selected and fully qualified to sit in judgment on [their] case.” *Id.* at 506. It is not so much a right to select as it is a right to reject jurors. *Pointer v. United States*, *supra*, 151 U.S. at 412.

It is, of course, true that “[t]here is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.” *Stilson v. United States*, 250 U.S. 583, 586 (1919).

But Congress has chosen to grant the right, *see Fed. R. Crim. P.* 24(b); 28 U.S.C. § 1866(e)(3), and it is an extremely important one.

Experience has shown that one of the most effective means to free the jury-box from [jurors] unfit to be there is the exercise of the peremptory challenge. The public prosecutor [and, presumably, the defendant] may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted.

Hayes v. Missouri, 120 U.S. 68, 70 (1887). More recent scholarship has tended to substantiate these earlier observations. *See, e.g.*, Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 495 (1978). Given this reality, the right of peremptory challenge has been held to be not only "one of the most important of the rights secured to the accused," *Pointer v. United States*, *supra*, 151 U.S. at 408, but also "a necessary part of trial by jury," *Swain v. Alabama*, *supra*, 380 U.S. at 219, and "essential in contemplation of law to the impartiality of the trial," *Lewis v. United States*, *supra*, 146 U.S. at 378, quoting *Lamb v. State*, 36 Wis. 424 (1874). *See United States v. Newman*, *supra*, 549 F.2d at 250 n.8:

The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants . . . [It is] one of the greatest safeguards the law has provided for a fair trial.

See also Swain v. Alabama, *supra*, 380 U.S. at 242 (Goldberg, J., dissenting) ("the peremptory challenge has long

been recognized primarily as a device to protect defendants") (emphasis in original).

Because of the importance of this right to defendants, "[a]ny system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Pointer v. United States*, *supra*, 151 U.S. at 408; *St. Clair v. United States*, 154 U.S. 134, 148 (1894). Thus, a defendant has the right "to exercise his full right of peremptory challenge," *United States v. Marchant*, 25 U.S. 480, 484 (1827), and "it must be exercised with full freedom, or it fails of its full purpose," *Lewis v. United States*, *supra*, 146 U.S. at 378, quoting *Lamb v. State*, *supra*. "The denial or impairment of the right is reversible error without a showing of prejudice." *Swain v. Alabama*, *supra*, 380 U.S. at 219. Under this standard, it is my view that the trial judge erred and that reversal is required.

A defendant "cannot be compelled to make a peremptory challenge until . . . an opportunity [has been given] for such inspection and examination of [each proposed juror] as is required for the due administration of justice." *Pointer v. United States*, *supra*, 151 U.S. at 408-09. The result of this requirement has been that "[t]he *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted." *Swain v. Alabama*, *supra*, 380 U.S. at 218-19. *See also Lurding v. United States*, 179 F.2d 419, 421 (6th Cir. 1950) (defendant is "entitled to probe for the hidden prejudices of the jurors"). Especially in cases attended by extensive publicity, as this case apparently was, there is a duty on the part of trial courts to conduct the *voir dire* with "painstaking care." *United States v. Kahaner*, 204 F.Supp. 921, 924 (S.D.N.Y. 1962) (Weinfeld, J.), aff'd, 317 F.2d 459 (2d Cir.), cert.

denied, 375 U.S. 835 (1963). Considering what is at stake for defendants in criminal trials, this is as it should be—the “due administration of justice” can allow no less. Just as in cases dealing with the scope of *voir dire* as it relates to “for cause” challenges, see, e.g., *United States v. Grant*, 494 F.2d 120, 123 (2d Cir.), cert. denied, 419 U.S. 849 (1974), it must be acknowledged that the trial court has a great deal of discretion on these matters, but it is a discretion “subject to the essential demands of fairness,” *Aldridge v. United States*, *supra*, 283 U.S. at 310. Broad as the trial judge’s discretion is, I think it was abused in this case.⁵

⁵ “[L]ike every other discretion, this one may be abused, and . . . it is then subject to review.” *United States v. Dennis*, 183 F.2d 201, 228 (2d Cir. 1950), aff’d, 341 U.S. 494 (1951). See also *The Jury System in the Federal Courts*, Report of the Judicial Conference Committee on the Operation of the Jury System, The Voir Dire Examination and Impanelling of the Jury, 26 F.R.D. 409, 465-66 (Approved by the Judicial Conference 1960). Cf. *United States v. Halper*, 590 F.2d 422, 428 (2d Cir. 1978) (“as with any power assigned to the discretion of the district court, there are limits, either express or implied, to its exercise”). It is Judge Magruder’s definition of “abuse of discretion” that this Circuit has chosen to follow in cases such as this one:

“Abuse of discretion” is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

In Re Josephson, 218 F.2d 174, 182 (1st Cir. 1954). See *Wong Wing Hang v. I.N.S.*, 360 F.2d 715, 718-19 (2d Cir. 1966); *Carroll v. American Federation of Musicians*, 295 F.2d 484, 488 (2d Cir. 1961). Compare *Delno v. Market St. Ry.*, 124 F.2d 965, 967 (9th Cir. 1942); *Finley v. Parvin/Dohrmann Company, Inc.*, 520 F.2d 386, 390-91 (2d Cir. 1975) (unique policies surrounding appeals from dismissals or refusals to dismiss under Fed. R. Civ. P. 41(b)).

Here, the record reveals that the trial judge exercised very little discretion. He simply announced what his decisions were, without having heard or requested oral or written argument from the attorneys, and immediately closed off discussion relating to those decisions. It can hardly be said that he “weigh[ed] the relevant factors.”

When a defendant requests a trial judge to ask on *voir dire* a question the answer to which may form the basis for a “for cause” challenge, the defendant bears the burden of convincing the court that the question or the resulting information is “relevant” to the case at hand. *Ham v. South Carolina*, *supra*, 409 U.S. at 532-33 (Marshall, J., concurring and dissenting). It is in this manner that the defendant is able to discover “actual bias” and, based on that discovery, exercise a challenge “for cause.” *Dennis v. United States*, 339 U.S. 162, 171-72 (1950). This determination of relevance is quite properly assigned to the sound discretion of the trial judge. This is not the standard, however, when what is being sought is information upon which to base a peremptory challenge.⁶ *United States v. Jefferson*, 569 F.2d 260, 261-62 (5th Cir. 1978); *United States v. Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); *United States v. Lewin*, 467 F.2d 1132, 1137 (7th Cir. 1972); *Kiernan v. Van Schaik*, 347 F.2d 775, 779-80 (3d Cir. 1965); *Bailey v. United States*, 53 F.2d 982, 984 (5th Cir. 1931); *Beatty v. United States*, 27 F.2d 323, 324 (6th Cir. 1928). This reflects the very nature of the peremptory challenge—a challenge “exercised on grounds normally thought irrelevant to legal proceedings.” *Swain v. Alabama*, *supra*, 380 U.S. at 220. Thus, defendants should be permitted sufficient inquiry into surface information as well as the background and attitudes of prospective jurors to enable them to

⁶ It appears that the trial judge in this case acted under this very assumption, asking as he did a number of questions relating to marital status, number of children, occupation, occupation of family members and friends, educational background, membership in groups, clubs or fraternal organizations, past jury experience, and past involvement in legal disputes. Presumably not all of these were aimed at disclosing information which would provide the basis for “for cause” challenges only.

exercise intelligently their peremptory challenges.⁷ See *United States v. Harris*, 542 F.2d 1283, 1295 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States v. Dellinger*, *supra*, 472 F.2d at 367-68; *United States v. Lewin*, *supra*, 467 F.2d at 1137-38; *United States v. Esquer*, 459 F.2d 431, 434 (7th Cir. 1972), cert. denied, 414 U.S. 1006 (1973); *Kiernan v. Van Schaik*, *supra*, 347 F.2d at 779, 781; *Spells v. United States*, 263 F.2d 609, 611 (5th Cir.), cert. denied, 360 U.S. 920 (1959); *Bailey v. United States*, *supra*, 53 F.2d at 984; *Beatty v. United States*, *supra*, 27 F.2d at 324; ABA Standards, Trial by Jury § 2.4 (1968) & Commentary at 66-67. When it is generally recognized that counsel for criminal defendants often base peremptory challenges on certain types of information about prospective jurors, information such as race, nationality and religion, I would, in the absence of persuasive countervailing considerations, hold that a defendant is entitled to have asked on *voir dire* questions which are reasonably necessary to the discovery of that information. As expressly held in *Swain v. Alabama*, *supra*, "fairness of trial by jury requires no less." 380 U.S. at 221. See also *United States v. Jefferson*, *supra*, 569 F.2d at 262 (prior jury service). It is in light of these considerations that I evaluate the district

⁷ The *voir dire* is not always the only way that information about prospective jurors can be obtained by the parties. One other way is to conduct an independent investigation. See, e.g., *United States v. Falange*, 426 F.2d 930 (2d Cir.), cert. denied, 400 U.S. 906 (1970) (government investigation of prospective jurors with the aid of the F.B.I., local police departments, and credit bureaus); *United States v. Costello*, 255 F.2d 876 (2d Cir.), cert. denied, 357 U.S. 937 (1958) (government investigation of income tax records of panel members); but see *Kiernan v. Van Schaik*, 347 F.2d 775, 780 & n.9 (3d Cir. 1965); see generally Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 558-63 (1975). Here, independent investigation of the prospective jurors was not only impossible because of the jurors' anonymity but expressly prohibited by the trial judge. In such circumstances, the *voir dire* takes on added importance.

court's refusal to disclose the names and addresses of the prospective jurors and his refusal to inquire into the jurors' ethnic and religious backgrounds.

Section 3432 of Title 18 provides that "[a] person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with . . . a list of the veniremen . . . stating the place of abode of each venireman. . ." The case before us now is not a capital case but, nevertheless, it is the normal and better practice to provide to the government and the accused a list of prospective jurors and their addresses.⁸ ABA Standards, Trial by Jury § 2.2 (1968) & Commentary at 60-61. Such lists enable the parties, if they choose, to engage in independent investigations of prospective jurors, thus aiding the exercise of challenges and narrowing the required scope of the *voir dire*.⁹ These lists, and the possibility of investigation, serve another important function as well. They may deter prospective jurors from misrepresenting or minimizing embarrassing or possibly disqualifying aspects of their backgrounds. See *Clark v. United States*, 289 U.S. 1 (1932); *United States v. Floyd*, 496 F.2d 982, 990 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545, 547, 554.

Congress, when it passed the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 et seq., directing each federal

⁸ It appears well settled that it is within the trial court's discretion to withhold the list of prospective jurors until the day proceedings begin. See, e.g., *United States v. Scallion*, 533 F.2d 903, 913-14 (5th Cir. 1976), cert. denied, 429 U.S. 1079 (1977); *United States v. Hoffa*, 367 F.2d 698, 710 (7th Cir. 1966), vacated on other grounds, 387 U.S. 231 (1967). The protection of jurors' privacy in cases involving a great deal of publicity is a permissible reason for doing so. See, e.g., *United States v. Gurney*, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978).

⁹ See note 7, *supra*.

judicial district to devise a "plan" for the random selection of grand and petit jurors, required that the Plans "fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public." 28 U.S.C. § 1863(b)(8). At the same time, Congress provided that "[i]f the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require." *Id.* Article VII-B of the Southern District's Plan provides as follows:

The Clerk shall prepare separate lists of those assigned to each pool. These lists shall not be made public until the jurors have been summoned and have appeared at the Court House. Even then the Chief Judge may order the names kept confidential if the interests of justice so require.

Here, assuming that the trial judge had the authority to keep the names from the parties, and noting that there was no finding that the "interests of justice" required juror anonymity, it is nevertheless my view that, as to the withholding of the jurors' names alone, the trial judge's actions would not require reversal. The appellants do not argue otherwise.

This same reasoning applies, perforce, to the district court's refusal to disclose the street addresses of the prospective jurors. *See Johnson v. United States*, 270 F.2d 721, 724 (9th Cir. 1959), cert. denied, 362 U.S. 937 (1960); *Wagner v. United States*, 264 F.2d 524, 527 (9th Cir.), cert. denied, 360 U.S. 936 (1959); *Hamer v. United States*, 259 F.2d 274, 278-79 (9th Cir. 1958), cert. denied, 359 U.S. 916 (1959). *See also United States v. Borelli*, 336 F.2d 376, 392

(2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). I must say, however, that learning of the county of the prospective juror's residence is, at least in the Southern District of New York, to learn very little that may be helpful to the intelligent exercise of peremptory challenges. I would suggest that, if there are to be situations in which prospective jurors' names and addresses are withheld from the parties, jurors should be asked to disclose the "approximate community" in which they reside, *Wagner v. United States*, *supra*, 264 F.2d at 527, or the "particular portion of the district," *Johnson v. United States*, *supra*, 270 F.2d at 724.

Because the defendants were not told the names and addresses of the prospective jurors, however, the trial judge should have inquired, in reasonable fashion, into the jurors' ethnic and religious backgrounds. His failure to do so constituted error and requires reversal.

The trial judge was simply incorrect in his apparent belief that 28 U.S.C. § 1862¹⁰ limits the permissible grounds on which a peremptory challenge may be exercised. It does not. *See United States v. Price*, 573 F.2d 356, 359-61 (5th Cir. 1978).¹¹ Peremptory challenges are expressly permitted under the statute. *See* 28 U.S.C. § 1866(c)(3); Fed. R. Crim. P. 24(b); Southern District Plan, Article VIII(3). And "[t]he essential nature of the peremptory challenge is

10 See note 3, *supra*, and accompanying text.

11 Nor does the requirement that the petit jury be "selected from a fair cross section of the community," *see Duren v. Missouri*, 47 U.S.L.W. 4089 (U.S. Jan. 9, 1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975), limit the permissible grounds on which peremptory challenges may be made by a defendant. Here, the jury was quite plainly "selected from" a source fairly representative of the community—the composition of the jury wheels, pools of names, panels or venires from which the jury was drawn is not challenged. *See Taylor v. Louisiana*, *supra*, 419 U.S. at 538; *United States v. Jenkins*, 496 F.2d 57, 65 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975).

that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama, supra*, 380 U.S. at 220. Indeed, inquiry into the reasons prompting a defendant to exercise a peremptory challenge has been, and should be, "barred and foreclosed." *United States v. Newman, supra*, 549 F.2d at 245. And I believe we can take judicial notice of the fact that peremptory challenges are often exercised on the basis of a prospective juror's "race, religion, [or] nationality." *Swain v. Alabama, supra*, 380 U.S. at 220. Such a challenge is, simply put, the archetypical peremptory challenge.

For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the *voir dire*, by both prosecutor and accused [F]airness of trial by jury requires no less. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

Swain v. Alabama, supra, 380 U.S. at 220-21 (emphasis added) (citations and footnotes omitted). The result of allowing this system of challenge, of course, is that otherwise qualified jurors are eliminated from jury service "whether they be Negroes, Catholics, accountants or those with blue eyes." *Id.* at 212. "In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."

Id. at 221.¹² This does not sully the administration of justice in our court system. See *Aldridge v. United States, supra*, 283 U.S. at 314-15. Quite to the contrary, it extends to defendants the chance to act not only on the basis of sound and persuasive reasoning but also on the basis of "hunches" in rejecting people from the jury that will ultimately decide whether the defendant shall go free or stand convicted. It is a system both justified by experience and "full of . . . tenderness and humanity." *Lewis v. United States, supra*, 146 U.S. at 376, quoting 4 Blackstone, Commentaries 353.

This is a unique case. The effect of the trial court's cluster of decisions regarding the conduct of the *voir dire* was to make the *voir dire* the only source of information about prospective jurors. Independent investigation was precluded. The information available to defense counsel was limited to that gleaned from the answers to the questions that were asked. With the identities and addresses of the prospective jurors a mystery, I believe it was error to refuse to make reasonable inquiry into their ethnic and religious backgrounds. Given the nature and the importance of the peremptory challenge in our criminal system, and given the absence of persuasive countervailing considerations, I believe that that information was required to be disclosed in order for the defendants fully

12 There are cases that uphold the refusal by a trial judge to inquire into the religion of a prospective juror. See, e.g., *Gold v. United States*, 378 F.2d 588, 594 (9th Cir. 1967); *Pope v. United States*, 372 F.2d 710, 726-27 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968); *Yarborough v. United States*, 230 F.2d 56, 63 (4th Cir.), cert. denied, 351 U.S. 969 (1956). But see *Aldridge v. United States, supra*, 283 U.S. at 313; *Miles v. United States*, 103 U.S. 304, 309-11 (1880). Here, the trial judge not only refused to inquire into the religious backgrounds of prospective jurors but also refused to inquire into their names, addresses and ethnic backgrounds.

to exercise their right of peremptory challenge. The absence of that information unnecessarily restricted the exercise of that right.

For these reasons I would reverse the judgments of conviction and order a new trial; for these reasons I dissent.

APPENDIX B**Orders Denying Rehearing or Rehearing *En Banc***

, UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and seventy-nine.

Present: HONORABLE ELLSWORTH VAN GRAAFEILAND
 HONORABLE THOMAS J. MESKILL,
 HONORABLE LEONARD P. MOORE
Circuit Judges.

78-1040

UNITED STATES OF AMERICA,

*Appellee,**v.*

LERoy Barnes, STEVEN BAKER, STEVEN MONSANTO, JOHN HATCHER, JOSEPH HAYDEN, WALLACE FISHER, WAYMIN HINES, WALTER CENTENO, LEON JOHNSON, LEONARD ROLLOCK, and JAMES McCoy,

Appellants.

A petition for a rehearing having been filed herein by counsel for the Appellants

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1045-1053, 1056, 1057—September Term, 1977.

(Argued June 22, 1978

Decided April 23, 1979.)

Docket Nos. 78-1040, 1045, 1050, 1051, 1056,
1058, 1059, 1060, 1061, 1063, 1067

On Rehearing en banc: Petition decided June 18, 1979

Dissenting opinion filed June 22, 1979

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEROY BARNES, STEVEN BAKER, STEVEN MONSANTO, JOHN HATCHER, JOSEPH HAYDEN, WALLACE FISHER, WAYMIN HINES, WALTER CENTENO, LEON JOHNSON, LEONARD ROLLOCK and JAMES McCoy,

Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants, a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Oakes, Timbers, and Meskill voted to grant the petition limited to the propriety of the *voir dire* examination. Judge Oakes reserves the right to file a memorandum.

OAKES, Circuit Judge (dissenting):

I dissent from the denial of the petition for rehearing en banc.

The panel majority affirming the appellant's convictions adopted an entirely new rule of law that so far as I know stands without precedent in the history of Anglo-American jurisprudence. The panel majority's sanction of the trial of a defendant in a criminal prosecution before an anonymous petit jury, without disclosure of even the approximate community or neighborhood in which the jurors reside and absent requested inquiry into ethnic and religious backgrounds (much of which would be revealed by the usual name and address), strikes a Vermont judge as bizarre, almost Kafka-esque. It makes peremptory challenges for all practical purposes worthless,¹ to me a sorry state of affairs.

Judge Meskill's dissenting opinion, *United States v. Barnes*, No. 78-1040, slip op. 5585, 5669 (2d Cir. Apr. 23, 1979), stands on its own feet. I would add only that so far as appears in the record no one had been threatened—as the majority said, “no untoward event had occurred up to the opening of the trial,” *id.* at 5602—and sequestration under protection would be an ample remedy if anyone had been. I note that no similarly anonymous jury drawing took place in any of the following cases, notwithstanding the notoriety of the defendants: *Buchalter v. New York*, 319 U.S. 427

(1973) (homicide trial of Murder, Inc.'s Louis “Lepke” Buchalter); *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960); *United States v. Costello*, 255 F.2d 876 (2d Cir.), cert. denied, 357 U.S. 937 (1958); *Capone v. United States*, 56 F.2d 927 (7th Cir.), cert. denied, 286 U.S. 553 (1932); *People v. Luciano*, 277 N.Y. 348, 14 N.E.2d 433, cert. denied, 305 U.S. 620 (1938). It would seem to me that there were other less drastic alternatives available here including revelation of the jurors' identities in camera to counsel, see, e.g., *United States v. Gurney*, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977) (jury listing, including addresses and other personal information, not publicly released), cert. denied, 435 U.S. 968 (1978); see also *United States v. Hoffa*, 367 F.2d 698, 710 (7th Cir. 1966) (jurors' names need not be read aloud in open court prior to *voir dire*), vacated on other grounds, 387 U.S. 231 (1967) (per curiam). I believe that the issue is of sufficient importance to be deserving of en banc treatment since judges in other narcotics cases are sure to follow its precedent as, to borrow a simile of Judge Timbers,² a flock of sea gulls follows a lobster boat. This case calls to mind Mr. Justice Holmes' dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904):

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Judges TIMBERS and MESKILL concur in this opinion.

¹ See Babcock, *Voir Dire: Preserving “Its Wonderful Power,”* 27 Stan. L. Rev. 545, 554 (1975).

² *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1321 n. 2 (2d Cir. 1973) (en banc).

APPENDIX C**Constitutional Provisions, Statutes and Rules Involved****Constitutional Provisions:****The Fourth Amendment to the
United States Constitution:**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**The Sixth Amendment to the
United States Constitution:**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes:**26 U.S.C. §6103 (Confidentiality and disclosure
of returns and return information):**

* * *

(i) Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration.—

(1) Nontax criminal investigation.—

(A) Information from taxpayer.—A return or taxpayer return information shall, pursuant to, and upon the grant of, an ex parte order by a Federal district court judge as provided by this paragraph, be open, but only to the extent necessary as provided in such order, to officers and employees of a Federal agency personally and directly engaged in and solely for their use in, preparation for any administrative or judicial proceeding (or investigation which may result in such a proceeding) pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party.

(B) Application for order.—The head of any Federal agency described in subparagraph (A) or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, may authorize an application to a Federal district court judge for the order referred to in subparagraph (A). Upon such application, such judge may grant such order if he determines on the basis of the facts submitted by the applicant that—

(i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed;

(ii) there is reason to believe that such return or return information is probative evidence of a matter in issue related to the commission of such criminal act; and

(iii) the information sought to be disclosed cannot reasonably be obtained from any other source, unless it is determined that,

notwithstanding the reasonable availability of the information from another source, the return or return information sought constitutes the most probative evidence of a matter in issue relating to the commission of such criminal act.

However, the Secretary shall not disclose any return or return information under this paragraph if he determines and certifies to the court that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.

* * *

(4) Use in judicial or administrative proceeding.

—Any return or return information obtained under paragraph (1), (2), or (3) may be entered into evidence in any administrative or judicial proceeding pertaining to enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or an agency described in paragraph (1)(A) is a party but, in the case of any return or return information obtained under paragraph (1), only if the court finds that such return or return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party. However, any return or return information obtained under paragraph (1), (2), or (3) shall not be admitted into evidence in such proceeding if the Secretary determines and notifies the Attorney General or his delegate or the head of such agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation. The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding.

28 U.S.C. §1862 (Discrimination prohibited):

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status.

28 U.S.C. §1863 (Plan for random jury selection):

(a) Each United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of sections 1861 and 1862 of this title, and that shall otherwise comply with the provisions of this title. The plan shall be placed into operation after approval by a reviewing panel consisting of the members of the judicial council of the circuit and either the chief judge of the district whose plan is being reviewed or such other active district judge of that district as the chief judge of the district may designate. The panel shall examine the plan to ascertain that it complies with the provisions of this title. . . . The district court may modify a plan at any time and it shall modify the plan when so directed by the reviewing panel. . . . Modifications of the plan made at the instance of the district court shall become effective after approval by the panel. . . .

(b) Among other things, such plan shall—

* * *

(7) fix the time when the names drawn from the qualified jury wheel shall be disclosed to parties and to the public. If the plan permits these names to be made public, it may nevertheless permit the chief judge of the district court, or such other district court judge as the plan may provide, to keep these names confidential in any case where the interests of justice so require.

* * *

28 U.S.C. §1866 (Selection and summoning of jury panels):

* * *

(c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 1863(b) of this title, no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be . . . (2) excluded by the court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or (3) excluded upon peremptory challenge as provided by law, or (4) excluded pursuant to the procedure specified by law upon a challenge by any party for good cause shown, or (5) excluded upon determination by the court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (5) of this subsection unless the judge, in open court, determines that such is warranted and that exclusion of the person will not be inconsistent with sections 1861 and 1862 of this title. . . .

* * *

Rules:**Rule 24 of the Federal Rules of Criminal Procedure (Trial Jurors):**

(a) **Examination.** The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it

deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) **Peremptory Challenges.** . . . If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. . . . If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

* * *

OCT 17 1979

RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1979

No. 79-261

LEROY BARNES, STEVEN BAKER, JOSEPH HAYDEN, JOHN HATCHER, WAYMIN HINES, JAMES MCCOY, WALLACE FISHER, WALTER CENTENO, LEON JOHNSON, STEVEN MONSANTO and LEONARD ROLLOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SUPPLEMENT TO THE PETITION

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IN THE

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October Term, 1979

No. 79-261

LEBOY BARNES, STEVEN BAKER, JOSEPH HAYDEN, JOHN HATCHER, WAYMIN HINES, JAMES MCCOY, WALLACE FISHER, WALTER CENTENO, LEON JOHNSON, STEVEN MONSANTO and LEONARD ROLLOCK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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◆◆◆◆◆
SUPPLEMENT TO THE PETITION

Petitioners Leroy Barnes, Steven Baker, Joseph Hayden, John Hatcher, Waymin Hines, James McCoy, Wallace Fisher, Walter Centeno, Leon Johnson, Steven Monsanto and Leonard Rollock respectfully submit the instant Supplement to the Petition for a Writ of Certiorari filed in this case on August 17, 1979, pursuant to Rule 24(5) of the Rules of the Supreme Court, in order to bring to the Court's attention intervening matters not available at the time of the initial filing of the Petition.

Preliminary Statement

On October 1, 1979, this Court granted certiorari in *Roberts v. United States*, No. 78-1793, 48 U.S.L.W. 3185 (October 2, 1979), agreeing to review the question of whether, in light of *United States v. Grayson*, 438 U.S. 41 (1978), a trial judge may take into account and consider as a sentencing factor a defendant's failure to cooperate with the Government and become an informant in imposing a maximum sentence upon him. See, *United States v. Roberts*, 600 F.2d 815 (D.C. Cir. 1979) (*per curiam*) (Bazelon, J., dissenting from the denial of rehearing *en banc*).

Petitioners herein had raised the identical issue before the Court of Appeals and the Court there ruled adversely that in imposing sentence, "the Court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered." (Pet. App. 53a-55a). At the time of filing the petition for a writ of certiorari in the instant case—August 17, 1979—petitioners herein were wholly unaware that a petition for certiorari was pending in *Roberts* and, indeed, the D.C. Circuit's *per curiam* affirmance in that case was not officially reported until September 1979—almost one month after the instant petition already had been filed.

Accordingly, in light of these intervening events, which have materially changed the posture of the instant case, petitioners respectfully submit this Supplement to the Petition in order to bring before the Court an additional Question Presented, properly raised before the Court of Appeals, regarding whether a trial court may consider a defendant's failure to cooperate with the Government as a negative factor in imposing sentence.

No prejudice to the Government is likely to ensue from the additional Question Presented in light of the fact that the issue in this case already had been raised and fully

litigated before the Court of Appeals. Moreover, the Government, in any event, has been granted an extension of time until October 23, 1979 within which to respond to the petition, and, thus, will have sufficient advance notice of the additional Question Presented in order to be able to respond properly thereto.*

Accordingly, in light of intervening events transpiring subsequent to the time of the initial filing of the petition, the close identity of issues in this case and the matter to be reviewed in *Roberts*, as well as the total absence of prejudice to the Government, it is respectfully submitted that the Court give consideration to the additional Question Presented herein. Rule 24(5), Rules of the Supreme Court; *Costello v. United States*, 365 U.S. 265, 284 (1961); *Grand Trunk Western R. Co. v. James*, 358 U.S. 915 (1958).

Supplemental Question Presented

4. Whether a trial court may consider a defendant's failure to cooperate with the Government as a negative factor in imposing sentence.

REASONS FOR GRANTING THE WRIT

IV

The Court of Appeals erred in holding that a trial court may consider a defendant's failure to cooperate with the Government as a negative factor in imposing sentence.

* In order to provide the Government with the maximum advance notice of this new development, counsel for petitioners notified the Department of Justice by telephone and letter on October 11, 1979 of the contemplated filing of the instant Supplement. A copy of this letter has been filed separately with the Clerk.

In *United States v. Ramos*, 572 F.2d 360 (2d Cir. 1978), the Second Circuit ruled that a defendant's failure to cooperate with the Government may not be considered as a permissible negative sentencing consideration and that any such sentence must be vacated. Relying on the Third Circuit's decision in *United States v. Garcia*, 544 F.2d 681 (3d Cir. 1976), the court vacated Ramos' sentence outright, specifically holding that a defendant's silence and failure to cooperate was not a permissible factor to be considered negatively in imposing sentence.*

Flying directly in the face of both *Ramos* and *DiGiovanni* (as well as the extensive authority underlying each), the Majority herein held that, quite the contrary, the sentencing court "may consider a defendant's cooperation or lack thereof as long as all factors are considered" (55a). Citing as its authority the Court's earlier decision in *United States v. Vermeulen*, 436 F.2d 72 (2d Cir. 1970)—which itself had been distinguished in *Ramos* (572 F.2d at 363 n.2)—the Majority ruled that, contrary to *Ramos*, *DiGiovanni* and *Sweig* and in purported reliance on *Vermeulen*, the sentencing court *may* take lack of cooperation into account in imposing sentence so long as it is only one of the factors involved (53a-55a).

* The *Ramos* principle subsequently was reaffirmed in *DiGiovanni v. United States*, 596 F.2d 74 (2d Cir. 1979), wherein the sentencing court's imposition of a "more serious sentence" because of defendant's refusal to cooperate with the authorities was vacated by the court. As noted by Judge Lumbard:

"A defendant's cooperation with the authorities is, of course, one of the mitigating factors that may be taken into account by the sentencing judge, *see, e.g.*, *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972), but as was noted in *United States v. Ramos*, 572 F.2d 360, 363, n.2 (2d Cir. 1978) (Lumbard, J., concurring), 'It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense.'"

Id., 596 F.2d at 75.

The confusion that the Majority herein has now engendered as well as the logical and practical irreconcilability of the Court's opinion with *Ramos*, *DiGiovanni*, *Garcia* and *Roberts*, plainly necessitates clarification by this Court and the granting of certiorari herein. Rule 19(1)(b), Rules of the Supreme Court.

Even in the absence of *Ramos*, innumerable decisions long have recognized that punishing a defendant for refusal either to admit guilt or to cooperate violates the Fifth Amendment privilege against self-incrimination. *See, e.g.*, *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969); *LeBlanc v. United States*, 391 F.2d 916 (1st Cir. 1968); *United States v. Roberts*, *supra*, 600 F.2d at 817 & n.7 (Bazelon, J., dissenting from denial of rehearing *en banc*) (and cases cited therein), *cert. granted*, 48 U.S.L.W. 3185 (October 2, 1979).

In *United States v. Garcia*, *supra*,—relied upon in *Ramos*—the Third Circuit described precisely the dilemma confronting these defendants:

In order to obtain lenity . . . appellants were in effect coerced to furnish the prosecutor with factual information of a broader and potentially unlimited factual scope. And they were required to disgorge this information without any assurance of immunity from future federal or state prosecutions resulting from the information supplied by them.

* * *

The appellants were put to a Hobson's choice; remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too

high. We, therefore, cannot permit the sentences to stand.

Id., 544 F.2d at 684-85.

The Fifth Circuit likewise indicated that the Fifth Amendment bars the imposition of a more severe sentence than otherwise would have been imposed because of defendant's failure to confess or to identify other members of the conspiracy. *United States v. Rogers*, 504 F.2d 1079, 1084-85 (5th Cir. 1974); *United States v. Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974), dissenting opinion adopted en banc, 509 F.2d 539 (5th Cir. 1975).

Here, by contrast, the sentencing judge stated explicitly on two separate occasions that he took into consideration the failure of *all* defendants to cooperate "in making these sentences" and that it was, moreover, a factor upon which he placed "great emphasis".*

* Immediately upon sentencing petitioner Monsanto, the Court stated:

I should also note for the record that the Court took into consideration the fact that this defendant—actually no defendant in connection with this case—has cooperated and *the Court is entitled to take into consideration in making these sentences the fact that [sic] non-cooperation as well as the fact of cooperation and in this day and age where heroin is the disease which we do not seem to be able to stamp out, I place great emphasis on the question of cooperation.* (emphasis added).

In the course of sentencing petitioner Baker, the district judge reiterated his reliance on all defendants' failure to cooperate:

I also consider you have failed as have *all of the other defendants*, to cooperate with the government in this connection, and that only through *the cooperation of these defendants* will we in some way make a dent into the drug traffic. (emphasis added).

Indeed, petitioners' failure to cooperate was repeatedly urged upon the court as a negative factor by the Government in its Sentencing Memorandum and in its repeated remarks during the various sentences (Baker Sentence); (Johnson Sentence); (Rollock Sentence); (Hines Sentence).

Furthermore, the sentences imposed here were extraordinarily severe. One defendant received a life sentence without possibility of parole, five others received maximum thirty-year sentences, and another received the maximum fifteen-year sentence permitted under the statute. Petitioners Hatcher and Baker, despite having no prior criminal record, received the same maximum thirty-year sentence as those defendants who did. Contrary to the Majority's assertion (54a), the virtually uniform maximum sentences imposed herein effectively belie any serious consideration of individualized sentencing factors.

If permitted to stand, the ramifications of the Majority's ruling herein (as well as that of *Roberts*) are potentially far-reaching in the day to day administration of criminal sentencing throughout the Nation. To what degree may failure to cooperate now be considered as a factor? May it be used merely to enhance otherwise lawful sentences or may sentences of "*in terrorem* proportions" be imposed to induce cooperation? (*Cf., Ramos*, 572 F.2d at 363 (Lumbard, J., concurring)). The Majority opinion provides nary a clue.

Consideration by this Court, accordingly, is clearly warranted of the Majority's wholly ill-conceived—and improvident—abridgement of petitioners' Fifth Amendment rights in the context of sentencing proceedings. Accordingly, for all the same reasons asserted in *Roberts v. United States, supra*, the petition for a writ of certiorari herein similarly should be granted.

CONCLUSION

The petition for a writ of certiorari, and the supplement to the petition, should be granted.

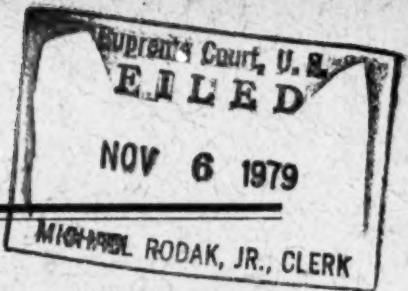
Dated: New York, New York
October 17, 1979

Respectfully submitted,

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No. 79-261

In the Supreme Court of the United States
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LERoy Barnes, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-100a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1979. A petition for rehearing was denied on June 18, 1979 (Pet. App. 101a-105a). Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including August 17, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper for the district court to consider petitioners' refusal to cooperate with the government as one factor in imposing sentence.
2. Whether petitioners were denied their Sixth Amendment right to an impartial jury by the district court's refusal during voir dire to require disclosure of prospective jurors' names and addresses and to inquire into their ethnic and religious backgrounds.
3. Whether the district court abused its discretion in dealing with a claim of juror misconduct.
4. Whether the district court properly refused to conduct a hearing into the manner in which the government obtained the tax returns of certain defendants.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to possess and distribute heroin and cocaine, in violation of 21 U.S.C. 846. Petitioner Barnes was convicted on one count of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848, and on one count of possessing and distributing heroin, in violation of 21 U.S.C. 841(a)(1). Also convicted on substantive charges of possession and distribution of heroin in violation of 21 U.S.C. 841(a)(1) were petitioners Fisher (three counts), Baker (two counts), McCoy (two counts), Monsanto, Hatcher, Hines, Rollock and Centeno. In addition, petitioner Johnson was con-

victed on two counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1), and petitioner McCoy was convicted of unlawfully carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).¹ The court of appeals affirmed, one judge dissenting (Pet. App. 1a-100a).

1. The evidence presented at trial, the sufficiency of which is not in dispute, showed that petitioner Barnes was the head of an organized syndicate that distributed massive quantities of narcotics on the

¹ Petitioner Barnes was acquitted on three substantive narcotics counts and petitioner McCoy was acquitted on two firearms charges. In addition, co-defendants Gary Saunders and Wayne Sasso were acquitted, and the jury failed to reach a verdict as to co-defendant Guy Fisher.

Petitioner Barnes was sentenced to life imprisonment, a life term of special parole, and a fine of \$125,000. Petitioner Baker was sentenced to two consecutive terms and one concurrent term of 15 years' imprisonment, to be followed by 6 years of special parole, and a fine of \$20,000. Petitioners Monsanto, Hatcher and Hines were each sentenced to two consecutive terms of 15 years' imprisonment, a total of 6 years' special parole, and \$20,000 in fines. Petitioner Hayden was sentenced to 15 years' imprisonment, a life term of special parole, and a fine of \$25,000. Petitioner Fisher was sentenced to a term of 8 years' treatment as a youth offender under 18 U.S.C. 5010(c). Petitioner Johnson was sentenced to two consecutive terms and one concurrent term of 15 years' imprisonment, a total of 6 years' special parole, and a \$10,000 fine. Petitioner Rollock was sentenced to two concurrent terms of 15 years' imprisonment and three years' special parole. Petitioner McCoy was sentenced to three concurrent terms of 15 years' imprisonment, one consecutive term of five years' imprisonment, and three years' special parole. Petitioner Centeno was sentenced to treatment as a youth offender under 18 U.S.C. 5010(b).

streets of Harlem and the South Bronx, New York, from 1974 through March 1977. The organization's operations took two principal forms. On certain occasions members of the organization made wholesale "bulk sales" of narcotics in quantities of one-eighth kilogram or more and of a quality that allowed for further dilution before being sold for use by addicts (Pet. App. 7a-9a). The organization's greatest profits, however, came from high-volume "street sales" of small amounts, or "quarters," of user quality heroin (Pet. App. 9a). In order to facilitate the distribution of minimal purity narcotics, the organization obtained large quantities of cutting agents (quinine or mannite) necessary to dilute the heroin (Pet. App. 6a, 8a-10a). As part of the organization's efforts to conceal its operations, various members participated in "washing" the proceeds of the drug sales, *i.e.*, exchanging large quantities of small bills received from street sales for large denomination bills that could not be traced back to narcotics transactions (Pet. App. 7a). The organization reaped millions of dollars in profits from its narcotics operations (Pet. App. 38a-39a).²

² For example, the tax returns of petitioners Barnes, Hayden and Hines and co-defendants Guy Fisher and Wayne Sasso—all prepared by the same Detroit law firm—showed reported "miscellaneous" income totalling collectively over \$1,380,000 for the years 1974-1976 (Pet. App. 39a). The extraordinary scope and profitability of Barnes' narcotics operations were also evidenced by the lavish lifestyle of the co-conspirators. Barnes himself was the owner or operator of five Mercedes Benzes, a Cadillac, a Corvette and a Citroen Maserati. Another co-conspirator, Steven Monsanto, was the

2. The Barnes organization was dangerous as well as enormously profitable. Prior to trial, the government informed the trial judge that it had received a threatening communication directed against one of its major witnesses (Pet. App. 17a). The Court was also informed that several of the defendants, including petitioners Barnes and Hayden, had attempted to kill one of their organization's heroin distributors because of a dispute over money (Govt. Br. 67-68 & n.*). In fact, one potential government witness, Shepard Franklin, was murdered on the eve of trial at a garage where many of the Barnes organization's narcotics transactions took place (Pet. App. 18a n.7). Finally, in its motion papers seeking sequestration of the jury, the government informed the district court of three recent cases, each involving similar narcotics conspiracy charges brought in the Southern District of New York, in which there had been instances of jury tampering (Pet. App. 12a-13a n.3).

Because of the large scale of the narcotics distribution network and because of petitioner Barnes' alleged role as one of the major narcotics distributors in New York, this case generated a large amount of pre-trial publicity (Pet. App. 26a). An article about petitioner Barnes and his forthcoming trial was the cover story for the Sunday N.Y. Times, June 5, 1977 (Magazine). That article featured a full, front-page

driver of no fewer than 17 automobiles, including five Mercedes Benzes and two Cadillacs (Pet. App. 39a; Govt. Br. 9-10). ("Govt. Br." refers to the brief filed by the government in the court of appeals.)

color photograph of Barnes and described him variously as "Mr. Untouchable," a man who had become the most prominent heroin dealer in the entire New York area, and a man who had been indicted and acquitted on four prior state charges, including murder. Furthermore, much of the pretrial publicity emphasized the many alleged acts of violence of several of the defendants (Pet. App. 26a).

3. These facts created substantial problems for the district court in connection with the selection of the jury. The procedures followed by the district court are summarized in the opinion of the court of appeals (Pet. App. 11a-18a, 85a-87a). Prior to trial, the district court disclosed to counsel for the government and the defense that in order to shelter the jurors and their families from media inquiries and publicity, the names and addresses of the jurors would not be divulged to either side. In addition, the court stated that it would not comply with defense requests to question the jurors concerning their neighborhoods of residence or their religious and ethnic backgrounds (Pet. App. 85a-86a).³

The process of jury selection took nearly four days to complete (Pet. App. 87a). Each of the 150 prospective jurors was assigned a number, and the court then addressed several questions to the entire panel (Pet.

³ The court also granted the government's request to sequester the jury; petitioners do not challenge that decision (Pet. App. 86a & n.2).

App. 13a-14a).⁴ After numerous prospective jurors were excused for cause, the court questioned each juror individually concerning his or her occupation (and the occupations of family members), county of residence, family status, health problems, educational background, and membership in any organized group or association (Pet. App. 14a-15a). The prospective jurors were also asked whether they or their friends or relatives had dealt with any government agency assigned to investigate narcotics offenses; had been employed by the federal government or by any government investigative agency; had previously served as jurors; had been charged with a crime; had been subpoenaed to testify in court; or had been the complainant in a criminal case (*ibid.*). In addition, the court inquired whether the prospective jurors had any opinions about courts, defense attorneys, prosecutors

⁴ The government submitted 45 questions to be propounded to the panel; counsel for the defense submitted more than 100 (Pet. App. 13a). As the court of appeals correctly stated, "[t]he substance of these many requests, with the exception of ethnic background and religion, were embodied in the court's questions" (*ibid.*). These questions included whether the prospective jurors knew any of the attorneys or alleged participants involved in the case; whether they had had any contact with any individuals or businesses to which reference would be made during the trial; whether they could accept and apply the law as instructed by the court; whether they had any feelings about undercover agents, paid informants, or electronic surveillance which would prevent their fair judgment of the case; whether they, or close friends or relatives, had had any prior experiences with narcotics or with firearms which would prevent fair consideration of the case; whether they had seen or read anything that would influence their judgment; and whether they would be able to sit during a rather lengthy trial (Pet. App. 13a-14a).

or law enforcement officers that would prevent fair judgment of the case; whether they had ever been involved in a law suit with the federal government; and whether they had read, or had any previous knowledge, about this case (Pet. App. 15a).

All of the defendants except one (a Hispanic) were black (Pet. App. 12a). The district court addressed specific and comprehensive questions to the prospective jurors designed to uncover any racial prejudice (Pet. App. 15a-16a & n.4). For example, the court asked about each juror's general attitude toward blacks; whether the juror had ever moved to a different area because he had been disturbed by changing conditions; whether the juror had had any experience with persons of other races, creeds, or colors resulting in civil or criminal confrontations, or whether the juror had ever had any experiences with persons of different races arising out of employment, residence, or school situations, which might make him feel that he could not fairly judge such persons. Most prospective jurors were also asked whether they felt they were generally prejudiced against persons of other races (Pet. App. 15a-16a). In many instances, prospective jurors were excused when they admitted prejudice or a tendency to favor the government (Pet. App. 16a). Of the jurors who were selected, five were black, and one of the alternate jurors was Hispanic (Pet. App. 17a n.5).⁵

⁵ The district court allowed defense counsel 20 peremptory challenges, twice the number to which they were legally entitled. Fed. R. Crim. P. 24(b). All 20 challenges were exercised (Govt. Br. 71 n.*).

4. In affirming petitioners' convictions, the court of appeals concluded that under the particular circumstances of this case, in which so much pretrial publicity had been generated, and "in which allegations of dangerous and unscrupulous conduct abounded" (Pet. App. 27a), the district court's decision to withhold the names and addresses of the jurors constituted a proper exercise of discretion under Fed. R. Crim. P. 24(a). In reaching this decision, the court cited the threat that had been received against one of the government's witnesses, the death of the potential witness Franklin on the eve of trial, and the recent attempts to influence jurors in other large narcotics cases (Pet. App. 12a-13a n.3, 17a, 18a n.7, 26a).⁶ The court of appeals further concluded that the extensive information elicited from prospective jurors concerning their backgrounds and qualifications was sufficient to enable the parties to exercise their peremptory challenges intelligently (Pet. App. 19a-26a, 27a, 28a-31a).

In dissent, Judge Meskill acknowledged that the refusal to reveal the prospective jurors' names and addresses did not, standing alone, require reversal, and he noted that petitioners did not argue otherwise (Pet. App. 96a). Since the identities and addresses

⁶ The court pointed out that sequestration would not have provided adequate protection against the possibility of threats or retaliation. "[S]ince communication with their families during sequestration would have been permitted, a mere threat to the family of one juror would have permeated the entire jury," and following the trial, all of the jurors would be vulnerable to possible retaliation (Pet. App. 27a).

of the jurors were withheld, however, Judge Meskill concluded that the district court's refusal to inquire into the jurors' ethnic and religious backgrounds "unnecessarily restricted" (Pet. App. 100a) the defendants' exercise of their right of peremptory challenge.

ARGUMENT

1. Petitioners contend (Supp. Pet. 3-7) that the district court, in imposing sentence, improperly considered their failure to cooperate with the authorities. We believe that this contention was properly rejected by the court of appeals (Pet. App. 53a-55a) for the reasons stated by the court and in our brief in opposition in *Roberts v. United States*, cert. granted, No. 78-1793 (Oct. 1, 1979).⁷ As we noted there, a convicted defendant's refusal to assist the authorities may be considered in sentencing because it reflects his attitude toward his offense and toward society's effort to remedy the serious problems that his crime creates. See generally *United States v. Grayson*, 438 U.S. 41, 53 (1978). Nonetheless, because this issue is similar to that presented in *Roberts*, the Court may wish to defer disposition of this case pending a decision in *Roberts*.⁸ The other issues presented by petitioners, however, are without merit and do not warrant this Court's review.

⁷ We are sending petitioners' counsel a copy of our brief in *Roberts*.

⁸ If the *Roberts* case is affirmed, the petition should be denied in all respects. If *Roberts* is reversed, the present case can be remanded to the court of appeals for further consideration in light of *Roberts*.

2. Petitioners contend (Pet. 6, 9-17) that the district court's decision to withhold the names and addresses of prospective jurors, coupled with the court's refusal to inquire into the jurors' ethnic and religious backgrounds, violated petitioners' Sixth Amendment right to an impartial jury by depriving them of information they could have used in exercising their peremptory challenges. Petitioners concede (Pet. 11 n.*., 14) that inquiry into ethnic and religious backgrounds is not ordinarily required. Their contention (Pet. 14) is that the district court's refusal to inquire "either into jurors' names and addresses or their ethnic backgrounds * * * effectively emasculated [petitioners'] ability to intelligently exercise their peremptory challenges."

While there would ordinarily be little reason to restrict voir dire inquiry of the kind petitioners sought to make in this case, when reason exists to be concerned about the safety and welfare of the jurors or the integrity of their deliberations, the trial court enjoys discretion to accommodate the conflicting interests of defendants and jurors. Here, the court of appeals correctly held that, under the facts of this unusual case, the potential dangers posed by disclosure of the jurors' names, addresses, and certain background particulars outweighed any legitimate benefit to petitioners. Although peremptory challenges may be exercised for any or no reason, "that can hardly mean that every question suggested by counsel must be put by the trial judge because it might conceivably lead to a peremptory challenge." *United States*

v. *Gibbons*, 602 F.2d 1044, 1051 (2d Cir. 1979), petitions for cert. pending, Nos. 79-283 and 79-5256. By its examination of the issue of prejudice, the trial court assured petitioners a fair trial. And by its elicitation of extensive background information, the court assured that petitioners had a meaningful opportunity to exercise peremptory challenges. Moreover, since the prosecution as well as the defense was denied access to this information, there is no question of the former gaining any unfair advantages in the exercise of peremptory challenges.

a. Petitioners assert (Pet. 10) that the court of appeals has given the district courts virtually unlimited discretion to withhold juror identities from the parties in criminal trials. However, the court's ruling is expressly limited to the particular facts of this case, in which pretrial publicity was intense and "allegations of dangerous and unscrupulous conduct abounded" (Pet. App. 27a).⁹

In the circumstances presented here, the district court was fully justified in the precautions it took.

⁹ Several petitions for writs of certiorari have recently been filed in which a district court's refusal to permit inquiries into prospective jurors' addresses and neighborhoods or places of business is asserted as error. See *Gibbons v. United States*, No. 79-283; *Perry v. United States*, No. 79-5256; *Thompson v. United States*, No. 79-5387. But as petitioners conceded below (Pet. App. 18a-19a), the failure to disclose juror addresses does not in itself require reversal. Petitioners' argument here relies instead on the "cumulative effect" of the district court's rulings, which assertedly prevented the defense from learning the jurors' religious and ethnic backgrounds.

The court was aware of the fact that this case involved a massive narcotics conspiracy in which several members were accused of using weapons; that one of the government's chief witnesses had been the target of a death threat; and that several of the conspirators had attempted to kill one of the members of the conspiracy. The court was thus on notice that there was a substantial risk that disclosure of the jurors' names and addresses to the defendants or their associates could lead to attempts to influence the jurors by means of intimidation or bribery.¹⁰ Indeed, the trial court was familiar with specific recent instances of attempts to influence jurors in other similar trials of large narcotics conspiracies in the same district (Pet. App. 12a-13a n.3). Faced with this situation, the district court properly took reasonable steps to try to insure that the jury would be insulated from outside pressures and distractions.

Petitioners rely (Pet. 14-15) by analogy upon *Smith v. Illinois*, 390 U.S. 129 (1968), where the Court held that it was constitutional error for the

¹⁰ Moreover, given the extensive pretrial publicity surrounding this case, it was likely that if the jurors' names had been publicly disclosed, members of the press would have contacted relatives of the jurors during the trial. These contacts could have jeopardized the trial process itself, for while the jurors were sequestered, they were not kept from contacting their families. Moreover, if family members had been subjected to media inquiries, a substantial danger existed that they would have discussed these contacts with the jurors. The record reflects that during the trial—despite the district court's precautions—at least one member of the press did contact the spouse of a juror (Tr. 9581, 9700-9701).

trial court to sustain objections to defense questions seeking to elicit the name and address of a prosecution witness. But, as Mr. Justice White noted in his concurring opinion in *Smith* (390 U.S. at 133-134), the Constitution does not guarantee the right to ask questions—even of a witness—that may endanger the witness' personal safety. It was precisely this type of concern that prompted the district court's action. See *United States v. Borelli*, 336 F.2d 376, 392 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); *Johnson v. United States*, 270 F.2d 721, 724 (9th Cir. 1959), cert. denied, 362 U.S. 937 (1960); *Wagner v. United States*, 264 F.2d 524, 527 (9th Cir.), cert. denied, 360 U.S. 936 (1959).¹¹ Moreover, the right to cross examine an adverse witness at trial is far more extensive than the right to examine prospective jurors, whose qualifications are explored in a limited

¹¹ There is direct statutory support for withholding juror names and addresses in appropriate cases. In enacting 28 U.S.C. 1863(b)(7) (redesignated by Pub.L. No. 95-572, Section 2(a), 92 Stat. 2453, formerly 28 U.S.C. 1863(b)(8)), Congress provided that each United States District Court's Jury Selection Plan should fix a time for the disclosure of names drawn from the jury wheel, but Congress also expressly provided that the plan may nevertheless permit the district judges "to keep these names confidential in any case where the interests of justice so require." The House and Senate reports both state that this provision was meant to preserve the practice in some districts of keeping "juror names confidential for fear of jury tampering." S. Rep. No. 891, 90th Cong., 1st Sess. 29 (1967); H.R. Rep. No. 1076, 90th Cong., 2d Sess. 11 (1968). As Judge Meskill observed (Pet. App. 96a), the plan for the Southern District of New York provides that jurors' names may be kept confidential in the interests of justice.

hearing frequently conducted solely by the trial court. See Fed.R.Crim.P. 24(a); see also pages 16-17, *infra*.

Petitioners also argue (Pet. 17-23) that the district court should have explored less drastic alternatives rather than withholding the identities of the jurors. However, the district court did explore available alternatives and flexibly adopted procedures that accommodated the rights of the defendants and the jurors. The court increased the number of peremptory challenges available to the defense from 10 to 20 in order to assure that the defendants had an opportunity to select a suitable panel. Extensive background information was elicited, and the defense had the opportunity to observe the demeanor of all potential jurors and listen to their responses. The examination occupied four days of trial time, giving the defense sufficient opportunity to consider which jurors to challenge. Withholding information likely to facilitate identification of jurors was essential, however, in light of the extensive publicity surrounding the trial and the danger to jurors that would result if this information were disclosed.¹²

¹² Petitioners have failed to cite a single case in which this Court has applied a "less drastic alternative" principle in a similar context. Indeed, the Court rejected such an approach in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), where it was contended that before issuing a warrant to search for evidence of a crime at premises belonging to nonsuspects or newspapers, the magistrate must consider the use of other, less intrusive means. The Court's reluctance to impose such procedures in the context of a claim with strong First Amend-

b. Petitioners' argument (Pet. 10-17) that they were entitled to know the religious and ethnic backgrounds of the prospective jurors as an aid to their exercise of peremptory challenges misconceives both the nature of the peremptory challenge and the proper role of the voir dire in the jury selection process.

The Sixth Amendment guarantees a criminal defendant a trial by an "impartial jury." *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976). The peremptory challenge derives from the common law and is not constitutionally required. While its importance has been recognized (*Swain v. Alabama*, 380 U.S. 202, 219 (1965)), it is unlike the challenge for cause, which must be based on specified, legally cognizable grounds. It permits the rejection of a juror "for a real or imagined partiality that is less easily designated or demonstrable." *Id.* at 220. It is not subject to the court's control and may be exercised for any reason or for no reason, even arbitrarily or capriciously. *Ibid.*

Petitioners argue that because they were entitled to use their peremptory challenges to reject prospective jurors on the basis of the jurors' ethnic and religious backgrounds, they were necessarily entitled to receive specific information about ethnic and religious backgrounds through voir dire examination. But the right of peremptory challenge does not com-

ment overtones fortifies the conclusion that such procedures are inappropriate for voir dire examination, the conduct of which is committed to the trial court's broad discretion. Fed. R. Crim. P. 24(a).

mand a right to the peremptory question. *United States v. Gibbons, supra*, 602 F.2d at 1051. If the law were otherwise, the district court's concededly broad discretion over the questioning of prospective jurors (Fed. R. Crim. P. 24(a); *Ristaino v. Ross, supra*, 424 U.S. at 594; *Hamling v. United States*, 418 U.S. 87, 139-140 (1974); *Ham v. South Carolina*, 409 U.S. 524, 527, 528 (1973); *Aldridge v. United States*, 283 U.S. 308, 310 (1931)), would be subject to the whims of the defendant, who could insist on time-consuming inquiries concerning a host of arbitrary factors. The importance of vesting control in the district court over the scope of the voir dire is illustrated by the present case, in which the voir dire—even when conducted by the court—occupied four days, and over 150 questions were submitted by the parties for use in juror examination (Pet. App. 13a, 87a). A broader ranging voir dire would convert the proceeding into a trial of the jury, rather than a trial of the defendants.¹²

¹² The courts have repeatedly recognized that ethnic and religious background is generally irrelevant to juror qualifications, and that a trial judge may therefore properly decline to inquire into such matters on voir dire. See, e.g., *Gold v. United States*, 378 F.2d 588, 594 (9th Cir. 1967); *Yarborough v. United States*, 230 F.2d 56, 63 (4th Cir.), cert. denied, 351 U.S. 969 (1956) (religion is a "private matter"). Remote questions which pry unduly into the privacy of jurors are regularly denied in voir dire examinations. See, e.g., *United States v. Taylor*, 562 F.2d 1345, 1355 (2d Cir.), cert. denied, 432 U.S. 909 (1977); *United States v. Hamling*, 481 F.2d 307, 314 (9th Cir. 1973), aff'd, 418 U.S. 87, 138-140 (1974).

It bears emphasis that in this case petitioners' desire for religious and ethnic information did not derive from a need adequately to explore any relevant bias or prejudice that the jurors may have had. Whether a particular juror was black or white or had a foreign accent could easily be discerned. Of greater importance, the possibility of racial prejudice on the part of jurors was exhaustively explored in the voir dire. Apart from this possible prejudice, there was no question of ethnicity or religion in the case. At no point in this case have petitioners attempted to show that persons of any particular ethnic group (or religion) would have been more or less favorably disposed toward their cause. In short, petitioners have totally failed to demonstrate how they could have been prejudiced by the failure to inquire into ethnic and religious background.

The purpose of the voir dire is not to cater to the defendant's whims but to protect the defendant's right to trial by an impartial jury. See, e.g., *Ristaino v. Ross, supra; Aldridge v. United States, supra*, 283 U.S. at 311. That purpose was amply served in this case. The district court's questions were plainly "sufficient to test the qualifications and competency of the prospective jurors." *Hamling v. United States, supra*, 418 U.S. at 140. Indeed, as the court of appeals observed (Pet. App. 29a), the voir dire in this case was unusually extensive and provided petitioners with more than sufficient detailed information on which to form impressions about the jurors' biases or prejudices. Furthermore, the jury, as finally selected,

was in fact a fair and representative one, including five black jurors and one Hispanic alternate.¹⁴ The fact that the jury's verdict was selected (acquitting two defendants entirely, acquitting petitioners Barnes and McCoy on some substantive counts, and failing to reach a verdict as to another defendant) confirms that the jury weighed the evidence as to each defendant and reached a fair and impartial result based on the concededly sufficient evidence of each defendant's guilt. See *United States v. Delval*, 600 F.2d 1098, 1103 (5th Cir. 1979); *United States v. Haldeman*, 559 F.2d 31, 60 n.28 (D.C. Cir. 1976) (*en banc*), cert. denied, 431 U.S. 933 (1977).

Under all the circumstances, the district court did not abuse its discretion in failing to elicit information about ethnic or religious backgrounds. See *Connors v. United States*, 158 U.S. 408, 414-415 (1895); *United States v. Peterson*, 483 F.2d 1222, 1228 (D.C. Cir.), cert. denied, 414 U.S. 1007 (1973); *Government of Virgin Islands v. Felix*, 569 F.2d 1274, 1276-1278 (3d Cir. 1978); *United States v. Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978).¹⁵

¹⁴ As one defense counsel stated at trial (Tr. 767-768): "We have a jury which is a polyglot jury. It's a cross section of the New York Metropolitan area. The jury is composed of women, the jury is composed of black people, the jury is composed of older men, older women, younger women, young men, * * * parents, daughters, sons, grandparents."

¹⁵ Petitioners do not dispute that it is ordinarily permissible to withhold information about ethnic or religious background. As a general practice, the district courts in the Southern District of New York do not inquire into such matters during

3. Petitioners contend (Pet. 23-31) that the district court should have questioned a juror in midtrial concerning defense claims of bias arising from an incident in which one of a group of jurors allegedly made an insulting gesture toward counsel for a co-defendant, Guy Fisher (Tr. 5889-5892). Following the incident, Fisher's attorney requested that the juror be replaced with an alternate. The district court observed that the gesture, at most, represented the juror's temporary reaction (Tr. 5896, 5898) and declined to dismiss the juror. The court decided to give a cautionary instruction rather than conduct a hearing into the matter, noting that a hearing might itself engender resentment on the part of the jurors not only against Guy Fisher's attorney but against other defense counsel who were present at the time of the incident (Tr. 5896-5897). The court then admonished the jury that their personal feelings should not "be reflected for or against any of the defendants or government attorneys" (Pet. App. 33a).

Because the district court is in the position personally to observe the demeanor of the jury during the course of the trial, it has broad discretion in dealing with allegations of juror misconduct or prejudice. See *United States v. Bufalino*, 576 F.2d 446, 451-452 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United*

voir dire. Of course, both the prosecution and the defense are subject to identical limitations when the trial court confines the scope of the voir dire. Neither side obtains an advantage by such a procedure.

States v. Hendrix, 549 F.2d 1225, 1227-1229 (9th Cir. 1977); *United States v. Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), cert. denied, 429 U.S. 1103 (1977). Here, the precautions taken by the district court, which were tailored to the particular circumstances presented (*United States v. Chaussee*, 536 F.2d 637, 641 (7th Cir. 1976)), were a prudent exercise of its discretion.¹⁶ The court had good reason to fear that an inquiry could itself result in prejudice where none had previously existed. See *United States v. Delval*, *supra*, 600 F.2d at 1100-1101. There is no reason to speculate that the jury ignored the court's cautionary instruction, or that it failed to perform its duty to decide the case on the basis of the evidence.¹⁷ No further allegations of juror misconduct or prejudice occurred during the trial, and the jury's verdict reflected an absence of bias: the jury failed to reach a verdict as to Guy Fisher, the very defendant whose attorney was the target of the gesture; the jury also acquitted two other defendants and acquitted peti-

¹⁶ The cases relied on by petitioners (Pet. 28-29) are inapposite. In each of those cases, an inquiry was required because prejudicial newspaper articles raised a clear danger that the defendant would be convicted on the basis of extraneous facts that had not been adduced at trial.

¹⁷ In protracted trials, jurors may feel sentiments of disapproval for particular lawyers based on their conduct of the case. Instructions from the court to disregard such sentiments and to render a verdict based on the evidence serve to remind the jury of its sworn duty. See *United States v. Panebianco*, *supra*, 543 F.2d at 457.

tioners Barnes and McCoy on several substantive counts.

4. At trial, the government introduced into evidence the federal income tax returns of petitioners Barnes, Hayden, and Hines, and co-defendants Guy Fisher and Wayne Sasso. The returns revealed that these defendants reported hundreds of thousands of dollars of "miscellaneous" income during the period of the conspiracy. As the court of appeals concluded (Pet. App. 38a-41a), this evidence was clearly probative of the defendants' guilt on the narcotics offenses. Petitioners do not challenge this conclusion. Rather, they contend (Pet. 31-45) that the district court should have held a hearing to determine whether the tax returns were obtained in violation of the disclosure provisions of the Tax Reform Act of 1976, 26 U.S.C. 6103(i)(1). Failure to comply with the provisions of the Act, petitioners assert, would have rendered the tax returns inadmissible against them at trial. However, the court of appeals correctly concluded (Pet. App. 35a-38a) that there is nothing in the Tax Reform Act that gives a criminal defendant the right to a hearing to seek suppression of tax returns.

Neither the language nor the legislative history of the Act suggests that Congress intended to provide an exclusionary sanction under the Act. Unlike the federal wiretap statute (18 U.S.C. 2518 (10)) and the federal rule governing search warrants (Fed. R. Crim. P. 41(f)), which explicitly provide for the exclusion of evidence, Section 6103(i)(4) states only

that before admitting into evidence a return obtained under subsection (i)(1), the court must find that the return "is probative of a matter in issue relevant in establishing the commission of a crime or the guilt of a party." See S. Rep. No. 94-938, 94th Cong., 2d Sess. 329-330 (1976).

It is true, as petitioners assert (Pet. 37-41), that in enacting the Tax Reform Act, Congress was interested in protecting taxpayer privacy by changing the prior practice in which federal agencies were able to obtain returns "for nontax purposes almost at their sole discretion." S. Rep. No. 94-938, *supra*, at 328. But an interest in protecting privacy does not necessarily mean that Congress meant to create an exclusionary rule in federal criminal trials. As the court of appeals concluded (Pet. App. 38a), Congress was "apparently content to rely on a judge's competence to pass upon the facts submitted and the need for disclosure in a given case."¹⁸ Because the Act expressly provides for civil and criminal penalties for violations of its disclosure provisions (26 U.S.C. 7213(a) and 7217), there is no need for the courts to imply an exclusionary sanction.

Moreover, such a sanction would be contrary to Congress' intent, as expressed in the statute. The last sentence of Section 6103(i)(4), governing admissibility of tax returns and tax return information, specifically states:

¹⁸ In this case, Judge Werker issued an *ex parte* order authorizing release of the tax returns prior to trial (Govt. Br. 74 n.*).

The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding.

Under these circumstances, where no constitutional right is involved, where Congress has expressed the intent to deny an exclusionary remedy, and where privacy rights are protected by criminal and civil sanctions, there is no occasion to fashion additional exclusionary remedies. See generally *United States v. Caceres*, No. 76-1309 (Apr. 2, 1979).¹⁹

CONCLUSION

Insofar as it relates to the propriety of petitioners' sentences, the petition for a writ of certiorari should be held pending the Court's disposition in *Roberts v. United States, supra*. In all other respects, the petition should be denied.

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NOVEMBER 1979

¹⁹ This conclusion is fortified by the statutory procedure for obtaining tax returns. The government cannot obtain such returns without establishing to the satisfaction of the district court authorizing release that the evidence is probative and cannot be obtained from other sources. See 26 U.S.C. 6103 (i) (1) (B). Prior judicial supervision effectively prevents unwarranted invasions of privacy.

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October Term, 1979

No. 79-261

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY MEMORANDUM

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REPLY MEMORANDUM

Petitioners Leroy Barnes, Steven Baker, Joseph Hayden, John Hatcher, Waymin Hines, James McCoy, Wallace Fisher, Walter Centeno, Leon Johnson, Steven Monsanto and Leonard Rollock respectfully submit the instant Memorandum in reply to the Brief for the United States, pursuant to Rule 24(4) of the Rules of the Supreme Court, in order to address arguments first raised in the Government's brief in opposition.

1. With regard to the conduct of the jury *voir dire* and the empaneling of an "anonymous" jury, the Government once again contends that the trial judge was justified in taking such stringent (and unprecedented) precautions in light of fears for the safety and security of the veniremen. It is noteworthy, however, that the trial judge explicitly rejected the very same assertions of "dangerousness" when they originally were proffered by the Government prior to trial and specifically disavowed dangerousness as his "real" motivation for imposing jury anonymity (Pet. App. 87a).*

Demonstrative of the fact that the trial judge explicitly rejected unfounded accusations of dangerousness as a rationale underlying his decision, steadfastly maintaining that his actions were motivated exclusively by his concern for insulating the jury from the "irresponsibility" of the press, is the following colloquy occurring during the actual jury *voir dire* on September 27, 1977:

The Court: If I may have your attention for a moment, I read this article provided to me by the generosity of Mr. Breitbart on page 11 of today, September 27, 1977, Post.

. . . I have a definite recollection that with respect to the pre-trial conference that we had . . . May 2nd when I announced there was going to be an adjournment, Mr. Sear [the prosecutor] made an impassioned plea for the benefit of the press and, in the course of that, indicated that witnesses might be approached, etc., etc.

* It bears reiteration, of course, that despite its belated attempts to justify the trial judge's actions, the Government never requested the empaneling of an anonymous jury, perfectly content that ordinary sequestration, without more, would be fully sufficient to preserve the integrity of the trial process as well as the security of the jurors. Moreover, as noted by Judge Meskill, in dissent, at the time of the trial judge's surprise announcement, the Government was "noticeably silent." (Pet. App. 87a).

It is in that connection that I made the comment which is the direct quote in this article that I will not have witnesses or families threatened.

The reporter obviously is transposing this to the present day and this is significant in my opinion, of the irresponsibility of the press and drawing from it certain inferences by reason of the fact that we do have marshals present as we normally do in cases of this type.

* * *

I think this is the kind of thing that I want to try and isolate the jury from because here is something that happened in May and they are putting it down as though it happened today and it just isn't so and you and I both know it. (Tr. 369-371).

Moreover, the trial judge specifically rejected the same allegations of petitioners' purported involvement in witness intimidation that the Government once again raises here (Gov. Br. 5, 9, 13). At the Government's insistence, the trial judge afforded a pretrial opportunity for it to make an evidentiary showing of petitioners' dangerousness as part of its application to remand petitioners with "high risk" designations prior to trial. See Rule 6(b), Southern District Speedy Trial Plan. The trial court, however, quickly denied the Government's application when it became readily apparent that it had not presented one iota of competent evidence even remotely linking petitioners to the incidents complained of. See pretrial transcript of September 15, 1977 at 31-216. Indeed, contrary to the Government's claim, it may well be said that the trial court implicitly made findings of *nondangerousness* on the part of petitioners.

Furthermore, the Government still has provided no justification for the wholly precipitous manner in which the trial judge imposed jury anonymity in this case—simply announcing his decision *sua sponte* on the eve of trial and

immediately silencing all attempts at colloquy on the subject.*

Nor has the Government cited any specific instance where the trial court considered any less drastic alternatives, such as *in camera* revelation of jurors' identities to counsel, or where the court made findings that ordinary sequestration, without more, was an inadequate remedy under the totality of circumstances presented here. *See, e.g., United States v. Gurney*, 558 F.2d 1202, 1210 n. 12 (5th Cir. 1977).

Rather, the trial court broke with literally 200 years of precedent in the conduct of American criminal trials and did so in a situation in which it refused to explore, or even consider, any less drastic means before resorting to the unprecedented actions taken herein. As noted by Judge Oakes, in dissent, notorious criminals as disparate as Al Capone, Lucky Luciano, "Lepke" Buchalter, Frank Costello and the Apalachin defendants all have been provided jury trials where confrontation with the identities of veniremen has been an accepted part of the constitutional norm (Pet. App. 105a). The Government has provided no basis whatever for distinguishing those situations from that faced by petitioners in the case at bar.** The trial

* The Government is simply incorrect in its assertion that 28 U.S.C. § 1863(b)(7) provides statutory support for withholding jurors' names and addresses *at trial*. (Gov. Br. 14 n. 11). Examination of the legislative history underlying the Jury Selection and Service Act of 1968 (28 U.S.C. § 1861 *et seq.*) demonstrates conclusively that its provisions, as well as the comparable provisions of the Southern District Jury Selection Plan, relate exclusively to the pretrial empaneling of jury panels, not to the *voir dire* of individual veniremen as part of the trial process (Pet. App. 95a-96a). Moreover, the Government has cited no decision by any court which supports its interpretation of the statute. *Compare*, Pet. at 10-11 n.*.

** Nor has the Government demonstrated any manner in which sequestration was an inadequate prophylactic precaution. *Compare* Pet. App. 105a.

court's unprecedented actions in this regard constitute fundamental error warranting reversal.

2. With regard to the disclosure process by which petitioners' tax returns were acquired for use in a non-tax criminal prosecution, the Government argues that no hearing on the disclosure process was necessary because the last sentence of 26 U.S.C. § 6103 (i) (4) states that the improper admission of returns was not reversible error. Both the Government and the Court of Appeals, however, misconstrue the import of that sentence, and a proper reading makes clear that it has no application to this situation.

The final sentence of § 6103 (i) (4) reads:

"The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in such proceeding."

This sentence does *not* mean that the admission of tax returns can never be reversible error.* It means only that a return which is improperly admitted will not *automatically* require reversal. The drafters of the sentence gave the following example of its limited application:

"(D)isclosure (of returns) in a . . . trial . . . would not be allowed unless . . . such return is probative of the commission of the crime. Thus, a return . . . would not be admissible for purposes of 'collateral impeachment', i.e., discrediting a witness on matters not bearing upon the question of the guilt of the defendant.

* * *

* Such an interpretation would bring this sentence into direct conflict with the Due Process clause, 28 U.S.C. § 2111 and F.R.A.P. 52 (a)—all of which require reversal for non-harmless errors—and would raise serious doubts as to its constitutionality.

(W)hile the admission of the return in the proceeding would not constitute reversible error because it was admitted into evidence in violation of the provision, it nevertheless *may constitute reversible error on other grounds.*^{**} Joint Committee On Taxation, General Explanation of the Tax Reform Act of 1976, H.R. 10612, 94th Cong., Pub. Law 94-455 at 325.^{**} (emphasis added).

The last sentence of subsection (4), therefore, has no applicability to a violation of the disclosure provisions of subsection (1). *Cf., United States v. Mangan*, 575 F.2d 32, 39 n. 7 (2d Cir. 1978) (Friendly, J.). Accordingly, it does not provide any basis either for denying production of the information given the *ex parte* judge or for denying a hearing on the motion to suppress, and there must be a remand for both of these proceedings.^{***}

* Such as, e.g., prejudice under FRE Rule 403 or violation of the privilege against self-incrimination.

** This quotation, with the penultimate word inadvertently omitted, may also be found in [1976] U.S. Code Cong. & Admin. News at 3759. See also, Comment, *The Need for Reform of the Informational and Evidentiary Use of Tax Returns in Non-Tax Criminal Prosecutions*, 14 Am. Crim. L. Rev. 163, 187-88 (1976).

*** Even assuming *arguendo* that this Court rules that the last sentence of subsection (4) does render immune from reversal a conviction based upon returns obtained in violation of subsection (1), there still must be a remand for a hearing to determine whether subsection (1) was complied with.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 16, 1979

Respectfully submitted,

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